

No. 15102

United States
Court of Appeals
for the Ninth Circuit

THE CANADA LIFE ASSURANCE COM-
PANY, a Corporation, Appellant,

vs.

CHARLOTTE S. HOUSTON, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 360, inclusive)

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

JUL 25 1956

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 34395

CHARLOTTE S. HOUSTON, Plaintiff,

vs.

THE CANADA LIFE ASSURANCE COMPANY, NEW YORK LIFE INSURANCE COMPANY, and JEFFERSON STANDARD LIFE INSURANCE COMPANY,

Defendants.

PETITION FOR REMOVAL

To the Judges of the United States District Court for the Northern District of California, Southern Division:

The petition of The Canada Life Assurance Company respectfully shows:

I.

On the 4th day of January, 1955, an action was commenced against petitioner in the Superior Court of the State of California, in and for the County of Alameda, entitled Charlotte S. Houston, Plaintiff, vs. The Canada Life Assurance Company, New York Life Insurance Company, and Jefferson Standard Life Insurance Company, Defendants, numbered 262581, by the service upon petitioner of a summons and complaint, copies of which are annexed hereto. No further proceedings have been had therein.

II.

The claims of plaintiff against the New York Life Insurance Company and the Jefferson Standard Life Insurance Company are claims and causes of action separate and independent from the claims against petitioner.

III.

The above described action is one which this Court has original jurisdiction under the provisions of Title 28, United States Code, §1332, and is one which may be removed to this Court by petitioner, defendant herein, pursuant to the provisions of Title 28, United States Code, § 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs, and is between citizens of different states.

IV.

Petitioner is informed and believes and therefore alleges that plaintiff, Charlotte S. Houston, at the time this action was commenced, was and still is a citizen of the State of California, and defendant The Canada Life Assurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of Canada, and was not and is not incorporated under the laws of the State of California, and defendant New York Life Insurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of the State of New York, and was not and is not incorporated un-

der the laws of the State of California, and defendant Jefferson Standard Life Insurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of the State of North Carolina, and was not and is not incorporated under the laws of the State of California.

V.

Your petitioner herein files and presents herewith a bond with good and sufficient surety in the penal sum of Two Hundred Fifty Dollars (\$250.00) conditioned as required by Acts of Congress on that behalf duly made and provided, that petitioner will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that this case is not removable or is improperly removed.

Wherefore, your petitioner prays that this cause proceed in this Court as an action properly removed thereto.

KEESLING & KEESLING,
HENRY C. CLAUSEN,
/s/ By HENRY C. CLAUSEN,
Attorneys for Petitioner

Duly Verified.

Superior Court of the State of California in and
for the County of Alameda

Action No. 262581

Charlotte S. Houston, Plaintiff, vs. The Canada
Life Assurance Company, New York Life In-
surance Company, and Jefferson Standard Life
Insurance Company, Defendants.

SUMMONS

The People of the State of California to The Can-
ada Life Assurance Company, New York Life
Insurance Company, and Jefferson Standard
Life Insurance Company, Defendants:

You are hereby directed to appear and answer
the complaint filed in the County of Alameda in an
action entitled as above, brought against you in the
Superior Court of the State of California in and
for the County of Alameda, within ten days after
the service on you of this summons—if served
within said County, or within thirty days if served
elsewhere.

You are hereby notified that unless you appear
and answer as above required, the said plaintiff will
take judgment for any money or damages demanded
in the complaint as arising upon contract, or will
apply to the Court for any other relief demanded
in the complaint.

Witness my hand and the seal of the Superior

Court of the State of California in and for the
County of Alameda this 4th day of January, 1955.

[Seal]

Jack G. Blue, Clerk
By Eugene J. Donlon, Deputy
Angell and Adams,
Attorneys for Plaintiff

Served on Walsh, Asst. Secy & Legal Officer
1/12/54.

[Title of Superior Court and Cause No. 262581]

COMPLAINT UPON LIFE INSURANCE CONTRACTS

Comes now plaintiff above named and for a first
cause of action alleges:

I.

Plaintiff at all times herein mentioned has been
and now is a resident of the County of Alameda,
State of California, and is the widow of William
M. Houston, also known as William Mark Houston.

II.

Prior to February 22, 1954 said William M.
Houston was a resident of the City of Berkeley,
County of Alameda, State of California. On Feb-
ruary 22, 1954 said William M. Houston died at his
residence in said city and county as a result, di-
rectly and independently of all other causes, of
bodily injury effected solely through external, vio-
lent and accidental cause, to-wit, the accidental dis-
charge of a rifle being carried by said decedent.

III.

On February 22, 1954, said decedent was the named insured of a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953 in the face amount of \$10,000.00, subject to family income provision therein contained. At the date of issue of said policy, to-wit, November 3, 1953 said William M. Houston, named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. All premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. Plaintiff is the named beneficiary of said life insurance policy and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff has submitted to said defendant, The Canada Life Assurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy.

IV.

Under said family income provision attached to and made a part of said policy No. 1,003,546, issued by said defendant The Canada Life Assurance Company, plaintiff is entitled to receive a guaranteed income of \$200.00 per month, commencing February 22, 1954 and thereafter a like sum on the same day of each month to and including September 24, 1963, together with the sum of \$10,000.00 on September 24, 1963. Said plaintiff further has the right under said policy to elect to commute said monthly pay-

ments and receive a commuted value determined as set forth in said policy. The commuted value of said policy is approximately the sum of \$27,390.00.

V.

Defendant, The Canada Life Assurance Company, has refused to pay plaintiff the amounts payable to plaintiff under and pursuant to the terms of said policy except only the amount of premiums heretofore paid by said decedent thereunder and said defendant disclaims any other or further liability thereunder.

Wherefore, plaintiff prays judgment as hereinafter set forth.

As and for a second cause of action, plaintiff alleges as follows:

I.

Plaintiff hereby incorporates the allegations of Paragraphs I and II of the first cause of action to the same extent as though set forth in full herein.

II.

On February 22, 1954, said decedent was the named insured of two life insurance policies issued by defendant New York Life Insurance Company, as follows, to-wit:

1. Policy No. 6,851,866, issued November 3, 1920, in the face amount of \$2,000.00; and
2. Policy No. 6,851,867, issued November 3, 1920, in the face amount of \$3,000.00.

Each of said policies provide for the payment

to the beneficiary thereof of double the face amount of such policy upon receipt of due proof that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause.

III.

All premiums payable under said policies of defendant New York Life Insurance Company from the date of issue to February 22, 1954 have been paid and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policies, or either of them. Plaintiff is the named beneficiary of each of said policies. Plaintiff has submitted to said defendant New York Life Insurance Company due proof of decedent's death from accidental cause in compliance with all requirements of each of said policies.

IV.

Defendant, New York Life Insurance Company, has acknowledged liability and has paid or agreed to pay to plaintiff the face amount of each of said policies under and pursuant to the terms thereof, but has refused to pay and disclaims all liability under the double indemnity provisions of each of said policies.

Wherefore, plaintiff prays judgment as hereinafter set forth.

As and for a third cause of action, plaintiff alleges as follows:

I.

Plaintiff hereby incorporates the allegations of Paragraphs I and II of the first cause of action to the same extent as though set forth in full herein.

II.

On February 22, 1954, said decedent was the named insured of a policy of life insurance issued by defendant, Jefferson Standard Life Insurance Company, Policy No. 269,415, issued March 29, 1926 in the face amount of \$5,000.00, which said policy contains an undertaking by defendant, Jefferson Standard Life Insurance Company, to pay double the face amount of said policy if the death of the insured results directly and independently of all other causes, from bodily injury, effected solely through external, violent, and accidental means.

III.

All premiums payable under said policy of defendant, Jefferson Standard Life Insurance Company, from the date of issue to February 22, 1954 have been paid and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff is the named beneficiary under said policy. Plaintiff has submitted to said defendant, Jefferson Standard Life Insurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy.

IV.

Defendant, Jefferson Standard Life Insurance Company, has acknowledged liability and has paid or agreed to pay to plaintiff the face amount of said policy, but has refused to pay the amount payable to said beneficiary by reason of the double indemnity provision of said policy.

Wherefore, plaintiff prays judgment as hereinafter set forth.

Wherefore, plaintiff prays judgment, as follows:

(1) Upon the first cause of action against defendant, The Canada Life Assurance Company, the sum of \$27,390.00, being the commuted value of said policy on February 22, 1954, together with interest thereon at the rate of 7% per annum from February 22, 1954 to date of judgment.

(2) Upon the second cause of action against defendant, New York Life Insurance Company, the sum of \$5,000.00, together with any and all other sums payable under and pursuant to said policies by reason of the double indemnity provision therein contained, together with interest on said total sum at the rate of 7% per annum from February 22, 1954 to date of judgment.

(3) Upon the third cause of action against defendant, Jefferson Standard Life Insurance Company, in the sum of \$5,000.00, together with any and all other sums payable under and pursuant to said policy by reason of the double indemnity provision therein contained, together with interest on

said sum at the rate of 7% per annum from February 22, 1954 to date of judgment.

(4) Against all of said defendants, for plaintiff's costs of suit herein incurred.

(5) Against all of said defendants, for such other and further relief as to the Court seems just.

Dated: December 16, 1954.

Angell and Adams,
/s/ By Robert M. Adams, Jr.,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed Jan. 14, 1955.

[Title of Superior Court and Cause No. 34395.]

BOND ON REMOVAL

Know All Men By These Presents:

That we, The Canada Life Assurance Company, New York Life Insurance Company and Jefferson Standard Life Insurance Company, Defendants in the above entitled suit, as Principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as Surety, are held and firmly bound unto Charlotte S. Houston, Plaintiff, above named, in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, lawful money of the *United*, for the payment whereof, well and truly to be made, we hereby bind ourselves, our heirs, executors, successors and assigns, jointly and severally by these presents.

The Condition Of This Obligation Is Such, that whereas the said Principal has filed, or is about to file their petition in the Superior Court of the State of California in and for the County of Alameda, praying for the removal of a certain cause therein pending, as above entitled, wherein Charlotte S. Houston is the Plaintiff and the said Principal is the defendants to the Southern Division of the United States District Court for the Northern District of California.

Now, Therefore, if the said Principal shall enter in the said United States District Court, within thirty (30) days from the date of filing their said petition for removal, a certified copy of the record in said suit, and also shall appear therein, and shall well and truly pay all costs that may be awarded by the said United States District Court if said Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In Witness Whereof the Fidelity and Deposit Company of Maryland has caused these presents to be executed this 14th day of January, 1955.

[Seal]

Fidelity and Deposit Company of
Maryland,

/s/ By Erbon Delventhal,
Attorney-in-fact

Notary Public Certificate attached.

[Endorsed]: Filed January 14, 1955.

[Title of District Court and Cause.]

PETITION OF DEFENDANTS JEFFERSON
STANDARD LIFE INSURANCE COM-
PANY, A CORPORATION, AND NEW
YORK LIFE INSURANCE COMPANY, A
CORPORATION, FOR REMOVAL OF
CAUSE TO THE UNITED STATES DIS-
TRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

To the Honorable, The United States District
Court for the Northern District of California,
Southern Division:

Your petitioners, Jefferson Standard Life Insur-
ance Company, a corporation, and New York Life
Insurance Company, a corporation, defendants in
the above-entitled action, respectfully show to the
Honorable Court:

I.

That the above-entitled action was heretofore
brought and is now pending in the Superior Court
of the State of California, in and for the County
of Alameda, and is numbered 262581 in the records
and files of said court.

II.

That copy of summons and complaint in said
action were received by each petitioner herein on
or later than the 4th day of January, 1955.

III.

That the above-entitled cause is a civil action, to wit, an action to recover benefits under policies of life insurance therein described. That the matter therein in controversy exceeds the sum of **Three Thousand Dollars** (\$3,000), exclusive of interest and costs.

IV.

That said action is between citizens of different states.

V.

That plaintiff Charlotte S. Houston was at the time of commencement of said action and ever since has been and now is a citizen of the United States of America and a citizen, resident and inhabitant of the State of California.

VI.

That defendant, The Canada Life Assurance Company, was at the time of the commencement of said action and ever since has been and now is an alien corporation organized and existing under and by virtue of the laws of the Dominion of Canada and was not at any of said times and is not now a citizen, resident or inhabitant of the State of California.

VII.

That defendant, New York Life Insurance Company, a corporation, was at the time of the commencement of said action and ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the State

of New York and a citizen, resident and inhabitant of the State of New York and was not at any of said times and is not now a citizen, resident or inhabitant of the State of California.

VIII.

That defendant, Jefferson Standard Life Insurance Company, a corporation, was at the time of the commencement of said action and ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina and a citizen, resident and inhabitant of the State of North Carolina and was not at any of said times and is not now a citizen, resident or inhabitant of the State of California.

IX.

That your petitioners have not filed any pleading or otherwise appeared in said action and desire to remove the same, before any proceedings are taken therein, into the United States District Court for the Northern District of California, Southern Division, said Court being the District Court of the United States for the district and division within which such action is pending.

X.

That your petitioners offer and file herein a bond with good and sufficient surety, conditioned that they will pay all costs and disbursements incurred by reason of the removal proceedings should it be

Now, Therefore, if said Jefferson Standard Life Insurance Company, a corporation, and New York Life Insurance Company, a corporation, shall pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, the undersigned has caused these presents to be executed by its lawful representative thereunto duly authorized this 17th day of January, 1955.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,
/s/ By A. J. CLEFFI,
Its Attorney-in-Fact

Notary Public Certificate attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

BOND FOR SECURITY FOR COSTS

Know All Men By These Presents:

That the undersigned, Fireman's Fund Indemnity Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, as surety, is held and firmly bound unto the Clerk, Marshal or other officer of the above entitled court, and unto Charlotte S. Houston,

plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250), lawful money of the United States of America, for payment of which sum well and truly to be made the undersigned does bind itself, its successors and assigns, jointly and severally, firmly by these presents.

The conditions of this obligation are such that:

Whereas, Jefferson Standard Life Insurance Company, a corporation, and New York Life Insurance Company, a corporation, defendants in said action, have filed or are about to file a petition in the United States District Court for the Northern District of California, Southern Division, for the removal of said action from the Superior Court of the State of California, in and for the County of Alameda, into the said United States District Court;

Now, Therefore, if said Jefferson Standard Life Insurance Company, a corporation, and New York Life Insurance Company, a corporation, shall pay all fees in this action which they must by law pay to the Clerk, Marshal or other officer of the above entitled court, and all costs in this action which they may ultimately be required to pay to plaintiff, Charlotte S. Houston, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, the undersigned has caused these presents to be executed by its lawful repre-

sentative thereunto duly authorized this 17th day of January, 1955.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,
/s/ By A. J. CLEFFI,
Its Attorney-in-Fact

Notary Public Certificate attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

NOTICE OF ASSOCIATION OF ATTORNEYS

To Plaintiff Aove Named and to Angell & Adams,
Her Attorneys:

You and each of you will please take notice that defendant Jefferson Standard Life Insurance Company, hereby associates Bledsoe, Smith & Cathcart, 315 Montgomery Street, San Francisco, California, with the undersigned, as attorneys for said defendant.

/s/ KEESLING & KEESLING,

We hereby accept the foregoing association.

/s/ BLEDSOE, SMITH & CATHCART

Dated: January 24, 1955.

[Endorsed]: Filed January 27, 1955.

[Title of District Court and Cause.]

**ANSWER OF DEFENDANT NEW YORK
LIFE INSURANCE COMPANY**

Comes now one of the above named defendants, New York Life Insurance Company, a corporation, hereinafter referred to as "the Company", and as and for its separate answer to the complaint on file herein, admits, denies and alleges as follows:

**Answer to the Second Alleged Cause of Action in
Plaintiff's Complaint**

I.

Answering paragraph I of plaintiff's second alleged cause of action, the Company admits that at all times mentioned in the complaint on file herein plaintiff was, and still is a resident of the County of Alameda, State of California, and that plaintiff is the widow of William M. Houston, also known as William Mark Houston. The Company further admits that prior to February 22, 1954, said William M. Houston was a resident of the City of Berkeley, County of Alameda, State of California and that on or about February 22, 1954, said William M. Houston died at his residence in said city and county. Except as expressly admitted in this paragraph, the Company denies each and every, all and singular, the allegations of said paragraph I.

II.

Answering paragraph II of plaintiff's second alleged cause of action, the Company admits that on

or about the 3rd day of November, 1920, it issued its policy of life insurance numbered 6,851,866 to and on the life of said William M. Houston in the face amount of \$2,000.00. A full, true and correct copy of said policy of life insurance is annexed hereto, marked Exhibit "A", and is hereby made a part of this answer as fully as though here set forth at length. The Company admits that on or about the 3rd day of November, 1920, it issued its policy of life insurance numbered 6,851,867 to and on the life of said William M. Houston in the face amount of \$3,000.00. A full, true and correct copy of said policy of life insurance is annexed hereto, marked Exhibit "B", and is hereby made a part of this answer as fully as though here set forth at length. The Company relies upon each of said policies of life insurance and upon each and every provision contained therein. Except as expressly admitted or alleged in this paragraph, the Company denies each and every, all and singular, the allegations of said paragraph II.

III.

Answering paragraph III of plaintiff's second alleged cause of action, the Company admits the allegations of said paragraph III except the allegation that plaintiff has submitted to the Company due proof of decedent's death from accidental cause in compliance with all requirements of each of said policies. The Company denies that plaintiff has submitted to it due proof, or any proof at all, of decedent's death from accidental cause, as re-

quired by each of said policies of life insurance. The Company alleges that plaintiff has not furnished it due proof, or any proof at all, that the death of said William M. Houston resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within sixty days after sustaining such injury; as required by each of said policies of life insurance.

IV.

Answering paragraph IV of plaintiff's second alleged cause of action, the Company admits that it has paid or agreed to pay plaintiff the face amount of each of said policies of life insurance and that it has refused to pay and disclaims all liability under the double indemnity provisions of each of said policies.

V.

As and for a separate defense to plaintiff's second alleged cause of action, the Company affirmatively alleges that the death of said insured, William M. Houston, resulted from self destruction.

VI.

As and for a further and separate defense to plaintiff's second alleged cause of action, the Company affirmatively alleges that the death of said insured, William M. Houston, resulted from physical or mental infirmity or from illness or disease.

Answer to the First Alleged Cause of Action in
Plaintiff's Complaint

I.

Answering paragraphs I and II of plaintiff's first alleged cause of action, the Company here repeats, as fully as though here set forth at length, the allegations of paragraph I of its answer to plaintiff's second alleged cause of action.

II.

Answering paragraphs III, IV and V of plaintiff's first alleged cause of action, the Company alleges that it has no information or belief concerning the allegations of said paragraphs III, IV and V and, placing its denial upon that ground, denies each and every, all and singular, the allegations of said paragraphs III, IV and V.

Answer to the Third Alleged Cause of Action in
Plaintiff's Complaint

I.

Answering paragraph I of plaintiff's third alleged cause of action, the Company here repeats, as fully as though here set forth at length, the allegations of paragraph I of the answer to plaintiff's second alleged cause of action.

II.

Answering paragraphs II, III and IV of plaintiff's third alleged cause of action, the Company alleges that it has no information or belief concerning the allegations of said paragraphs II, III

and IV and, placing its denial upon that ground, denies each and every, all and singular, the allegations of said paragraphs II, III and IV.

Wherefore, this answering defendant, New York Life Insurance Company, prays that plaintiff take nothing from it by her complaint herein; that said defendant be dismissed with its costs of suit herein incurred; and that said defendant have such other, further and different relief as to this Court shall seem meet and proper in the premises.

/s/ MORRIS M. DOYLE,

/s/ E. M. MANNON,

/s/ McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Attorneys for Defendant, New York Life Insurance Company

Acknowledgment of Service attached.

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT JEFFERSON STANDARD LIFE INSURANCE COMPANY

Defendant Jefferson Standard Life Insurance Company, in answer to the third cause of action set forth in the complaint admits, denies and alleges as follows:

I.

Respecting the allegations incorporated by refer-

ence in Paragraph I thereof, defendant admits that plaintiff at all times mentioned in the complaint has been and now is a resident of the County of Alameda, State of California, and is the widow of William M. Houston, also known as William Mark Houston; defendant admits that said William M. Houston on and prior to February 22, 1954 resided in the City of Berkeley, County of Alameda, State of California and admits that he died at his residence in said City and County on February 22, 1954; defendant alleges that it does not have sufficient information or belief to enable it to answer the allegation incorporated by reference in said Paragraph I of third alleged cause of action that said William M. Houston died at his residence in said City and County as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental causes, to wit, the accidental discharge of a rifle being carried by said decedent, and basing its denial on such lack of information or belief, defendant denies said allegations; in this behalf defendant further alleges that it is informed and believes and on such information and belief alleges that the death of said William M. Houston resulted from self-destruction.

II.

Defendant admits the allegations contained in Paragraph II of the third alleged cause of action.

III.

Respecting the allegations contained in Para-

graph III of the third alleged cause of action, defendant admits all of the allegations therein contained except that defendant denies that plaintiff has submitted to defendant due or any proof of decedent's death from accidental cause in compliance with all or any of the requirements of said policy of insurance or otherwise.

IV.

Respecting the allegations contained in Paragraph IV of the third alleged cause of action, defendant admits that it has acknowledged liability for and has paid to plaintiff the face amount only of said insurance policy; defendant denies that any sums in excess of the face amount of said policy (i.e. any sums in excess of \$5000.00) are payable to or for the account of plaintiff either under the double indemnity provision of said policy or otherwise.

For a Further, Separate and Affirmative Defense, defendant alleges as follows:

I.

On or about March 29, 1926 defendant issued its policy of life insurance number 269415 to William M. Houston in the face amount of Five Thousand and no/100ths Dollars (\$5000.00); under and by the terms of said policy defendant engaged to pay to the beneficiary named therein the sum of Five Thousand and no/100ths Dollars (\$5000.00) on the death of said William M. Houston; in and by said policy of insurance it was further provided that

if the death of the insured therein named resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, defendant would pay double the face amount of the policy on account of the death of the insured; in and by said policy of insurance it was further provided that the afore-said double indemnity provision thereof should not apply if the death of the named insured resulted from self-destruction;

II.

Defendant has heretofore paid to plaintiff as the beneficiary named in said insurance policy the full face amount of the policy of insurance hereinabove referred to in the total amount of Five Thousand and no/100ths Dollars (\$5000.00); defendant is informed and believes and upon such information and belief alleges that the death of said William M. Houston on or about February 22, 1954, resulted from self-destruction, by reason whereof no double indemnity benefits are payable by or under the terms of said policy of insurance.

As a Second, Separate and Affirmative Defense, defendant alleges that all sums payable by defendant to plaintiff, on account of the death of said William M. Houston or otherwise, have been paid.

Wherefore, defendant prays judgment that plaintiff take nothing by reason of her complaint on file herein and that the same be dismissed; for defendant's costs of suit herein incurred and for such

other and further relief as to the court may seem proper.

/s/ WILLIAM H. KEESLING,

/s/ BLEDSOE, SMITH, CATHCART &
PHELPS,

Attorneys for Defendant Jefferson Standard Life
Insurance Company

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed March 24, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE CANADA
LIFE ASSURANCE COMPANY

Comes now one of the above named defendants, The Canada Life Assurance Company, a corporation, and as and for its separate answer to the complaint on file herein, admits, denies and alleges as follows:

Answer to the First Alleged Cause of Action

I.

Answering paragraph I of plaintiff's first alleged cause of action, this defendant admits the allegations therein contained.

II.

Answering paragraph II of plaintiff's first alleged cause of action, this defendant admits that prior to February 22, 1954, William M. Houston

was a resident of the City of Berkeley, County of Alameda, State of California; this defendant further admits that on February 22, 1954, said William M. Houston died at his residence in said City and County; except as expressly admitted in this paragraph, this defendant denies each and every, all and singular the remaining allegations of said paragraph II; defendant alleges that the death of William M. Houston resulted from suicide.

III.

Answering paragraph III of plaintiff's first alleged cause of action, this answering defendant admits that on February 22, 1954, said decedent was the named insured in a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, numbered 1,003,546, issued as of November 3, 1953, in the face amount of \$10,000.00, subject to family income provisions therein contained. A full true and correct copy of the policy of life insurance is annexed hereto, marked Exhibit "A", and is hereby made a part of this answer as fully as though herein set forth at length. This defendant further admits that at the date of issuance of said policy, to wit, November 3, 1953, said William M. Houston, the named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. This defendant further admits that all premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. This defendant admits that plaintiff is the named beneficiary of said life

insurance policy, and admits that there are no loans or other indebtedness payable to this defendant pursuant to or secured by said policy. This defendant denies that plaintiff has submitted to defendant due or any proof of decedent's death from accidental cause in compliance with the requirements of said policy.

IV.

Answering paragraph IV of plaintiff's first alleged cause of action, this defendant denies each and every, all and singular the allegations therein contained. This defendant further alleges that the commuted value under said policy is \$28,552.00 as of February 22, 1954, but denies that plaintiff has any rights thereto.

V.

Answering paragraph V of plaintiff's first alleged cause of action, this defendant admits that it has refused to pay to plaintiff the amounts claimed by plaintiff and admits that this defendant disclaims any liability under said policy, except only to pay to plaintiff the amounts heretofore paid by decedent thereunder. In this connection, this defendant alleges that it has tendered to plaintiff the sum of \$382.70 to the person entitled thereto but that said person has refused to accept said sum and that this defendant is ready, willing and able to pay said sum to the person entitled thereto.

First Affirmative Defense

For a first, separate and affirmative defense, this defendant alleges:

I.

That the written application for life insurance of William Mark Houston to this defendant, dated September 24, 1953, did contain as a part thereof, answers to the medical examiner.

II.

That under and by virtue of said written application for life insurance, it was represented and stated, among other things, by the said William Mark Houston, for the purpose of inducing this defendant Company to issue a policy and contract of life insurance on the life of the said William Mark Houston, that the said William Mark Houston used alcoholic stimulants only "socially" and only "occasionally", and never used alcoholic stimulants to excess.

III.

That relying upon the said representations and statements contained in said application and induced thereby, and not otherwise, this defendant on November 3, 1953 did issue its contract and policy of life insurance on the life of said William Mark Houston, but in this regard this defendant alleges that the provisions of said contract and policy of life insurance never took effect; that the representations made by the said William Mark Houston in said application were false and fraudulent; that the said William Mark Houston did in fact use alcoholic stimulants daily or almost daily, and did in fact on many occasions use alcoholic stimulants to excess.

IV.

That this defendant relied solely on the representations and statements made in the application of William Mark Houston to this defendant for life insurance, and said defendant did believe said answers and statements in said application to be true at the time of issuing of said policy, and this defendant had no information or reason to believe at the time of the issuing of said policy, or at the time of the delivery thereof, that all of said statements in said application were untrue; that said representations and statements were known to said William Mark Houston at the time the same were made to be untrue and false and were made for the purpose of inducing this defendant to issue a policy and contract upon the life of said William Mark Houston; that said representations and each of them was material to the risk of this defendant in issuing its policy of insurance in that this defendant would not have issued its policy of insurance had it known that said representations were false or untrue.

V.

That this defendant had no knowledge of the falsity of said representations or of the matters concealed by said William Mark Houston, relating to his condition of health at the time of making said application for said policy and contract of insurance, until after the receipt by it of the documents purporting to be the Proofs of Death when in the course of an investigation surrounding the said alleged Proofs of Death furnished to this de-

fendant by plaintiff it discovered the same. By these presents this defendant rescinds and repudiates said policy of insurance and offers to return and hereby tenders to plaintiff all premiums paid on account of said policy of insurance; this defendant now is ready, willing and able to return said premiums paid on said policy of insurance and offers to deposit with the Clerk of Court the amount of premiums herein tendered to plaintiff.

Second Affirmative Defense

For a second, separate and affirmative defense, this defendant alleges:

I.

That Policy No. 1,003,546 issued as of November 3, 1953 in the face amount of \$10,000.00, subject to the family income provisions therein contained, a full true and correct copy of which is annexed hereto, marked Exhibit "A", and issued upon the life of William H. Houston, naming plaintiff beneficiary thereunder, provides in part as follows:

"Suicide. During the first two years from the date of issue of this policy, suicide (whether the assured be sane or insane) is a risk not assumed under this policy; should death occur in such manner that the assurance is not effective because of the operation of this provision, the Company will pay an amount equal to the premiums paid under this policy, which amount will be paid in one sum to the person or persons who would have been entitled to the net proceeds of this policy or the first

payment therefrom had this policy matured by reason of the assured's death."

II.

That the family income provision attached to and made a part of the said policy No. 1,003,546, provides in part as follows:

"Exception. This provision will be inoperative in the event that the assured's death occurs under such circumstances that the payment provided for in the Suicide provision becomes payable."

III.

That the death of said William M. Houston on or about February 22, 1954 resulted from suicide, by reason whereof under the above provisions of the said policy and family income provision no benefits are payable by or under the terms of said policy of insurance.

IV.

That on or about July 13, 1954, this defendant tendered to plaintiff the sum of \$382.70, pursuant to the terms of the above mentioned suicide clause in said policy but plaintiff has refused to accept such sum; this defendant is ready, willing and able to pay said sum to plaintiff or to any other person entitled thereto, and offers to deposit with the Clerk of Court the amount of premiums herein tendered to plaintiff.

Wherefore, this defendant, The Canada Life Assurance Company, prays that plaintiff take nothing

by way of her complaint herein; that this defendant be dismissed with its costs of suit herein incurred; and that this defendant have such other and further relief as to the court may seem proper.

KEESLING & KEESLING,
HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendant, The Canada Life Assurance Company

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1955.

[Title of Superior Court and Cause No. 34395.]

NOTICE OF MOTION AND MOTION TO STRIKE DEFENSE FROM ANSWER

To Defendant, The Canada Life Assurance Company, and to Keesling & Keesling and Henry C. Clausen and Henry C. Clausen, Jr., Its Attorneys:

Please take notice that the plaintiff will move the above-entitled Court at the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, at 9:30 o'clock a.m., on the 18th day of April, 1955, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(f), F.R.C.P., striking the First Affirmative Defense from the Answer of defendant, The Canada

Life Assurance Company, on the ground that said defense fails to state a legal defense to the cause of action set forth in plaintiff's complaint herein.

Dated: April 8, 1955.

ANGELL & ADAMS,
/s/ By EDWARD K. ALLISON,
Attorneys for Plaintiff

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Apr. 9, 1955.

[Title of District Court and Cause.]

DISMISSAL OF ACTION AS TO DEFEND-
ANT NEW YORK LIFE INSURANCE
COMPANY

The above entitled action is hereby dismissed with prejudice as to defendant New York Life Insurance Company, each party to pay her or its own costs.

Dated: October 3, 1955.

/s/ EDWARD K. ALLISON,
/s/ ANGELL and ADAMS,
Attorneys for Plaintiff

It Is So Ordered:

/s/ GEORGE B. HARRIS,
United States District Judge

October 5, 1955.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause.]

DISMISSAL

To the Clerk of the Above Entitled Court:

You are hereby directed to dismiss with prejudice the above entitled action as to the defendant, Jefferson Standard Life Insurance Company, said dismissal to operate as a retraxit as to said defendant, Jefferson Standard Life Insurance Company, each party to pay her or its own costs.

/s/ CHARLOTTE S. HOUSTON,
Plaintiff

ANGELL and ADAMS,
s/ By EDWARD K. ALLISON,
Attorneys for Plaintiff

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

The plaintiff seeks to recover on a life insurance policy which is dated November 3, 1953, and the defendant defends on two grounds: 1. The policy is voidable because of misrepresentation of material facts in the application; and 2. Because the in-

sured died from a wound which was intentionally self-inflicted with a rifle.¹

The application dated September 24, 1953 contains the following statements:

"I declare that to the best of my knowledge or belief I am at present in good health, not being afflicted with any disease or disorder * * * except as may be disclosed * * * and that the above statements are complete and true."

At the end of the policy is the statement:

"The answers recorded above are as given by me and are complete and true."

In the body of the application the following question and answer appears:

6.(a) "Q. To what extent do you use alcoholic stimulants? A. Yes, socially only occasionally.

(b) Q. Have you ever used them to excess? A. No."

It is defendant's contention that Mr. Houston, the deceased, habitually used alcoholic stimulants, and at times used them to excess. The defendant bears the burden of proving that Mr. Houston made a material misrepresentation in the application for insurance. *Everett vs. Standard Acc. Ins. Co.*, 45 C.A. 332; *Scoles vs. Universal Life Ins. Co.*,

¹ The application for the insurance was made on September 24, 1953. The death occurred February 22, 1954. Under the policy the company would not be liable in the event death occurred by suicide within the first two years. The company, however, would repay the premiums.

42 C. 523; Mickschl vs. The National Council of the Knights & Ladies of Security, 40 C.A. 100.

It is the Court's view that Mr. Houston's answers to the general questions regarding his consumption of alcohol are to be regarded as expressions of insured's opinion and that the questions having been framed by defendant, they are bound by any ambiguity or uncertainty that may arise from the answers. McEwen vs. New York Life Ins. Co., 42 C.A. 133; Mayfield vs. Fidelity & Casualty Co., 16 C.A. (2d) 611.

Defendant's evidence concerning the insured's use of alcohol failed to establish any material misrepresentation, and viewing the entire evidence on this point the Court cannot conclude that the insured's use of alcohol was proven to be excessive or unusual so that it can be said that he misrepresented the facts in answering the general questions propounded to him in the application.

The insured's wife and two daughters, close friends and business associates, including three members of the bar of this Court, who saw him regularly over a period of years, the partner in his Oregon ranch enterprise, and two of his hunting companions all testified that they had never known the insured to be intoxicated or under the influence of alcohol without full possession of all his mental and physical faculties. Defendant's evidence on this point failed to establish by a preponderance of evidence that a misrepresentation had been made.

The other contention made by the defendant is that the insured died by his own hand rather than

as the result of an accident. The rule applicable to the defense of "misrepresentation" is also applicable to the defense of "suicide", i.e., the defendant has the burden of establishing its affirmative defense, *Beers vs. Cal. State Life Ins.*, 87 C.A. 440. The defendant claims that the undisputed physical facts indicating suicide are decisive on the question of burden of proof, and that the physical facts are consistent only with the defense of suicide and are not consistent with the theory of accident. The evidence presented at the trial was without dispute, so far as the actual evidence of the manner in which Mr Houston met his death.

Briefly summarized the evidence was as follows:

On the Friday before Mr. Houston met his death, he put in a full day at his insurance office. He made plans for activities for the coming week which were shown on his calendar by his secretary. He told his secretary he wouldn't stay to dictate a letter to the home office regarding business activities for the coming year of 1954, and would leave it until Tuesday.

On the Saturday preceding his death he attended a function given for his daughter by her sorority. On the following day, Sunday, he went to church, as usual, with his family and spent the afternoon with two business associates making plans for furthering a farming and cattle venture in southern Oregon. That evening Mr. Houston hurried back from the meeting to a dinner with the Hanscoms. Ann Houston, Mr. Houston's younger daughter was engaged to Mr. and Mrs. Hanscom's

son, and they were having a regular family get-together.

Later in the evening the Houston family left for home, and retired about 11:30 p.m. Mrs. Houston testified that her husband slept until late in the afternoon, remaining in bed until 1:30 or 2:00 o'clock, until she called. She said that this was usual and customary, and that on holidays and weekends the family often slept late.

She testified that she and Ann, her daughter, got up about 9:00 or 9:30, that they had their breakfast, and they had done things around the house. On towards lunch time Mrs. Houston awakened her husband and asked him if he wished to come down for breakfast. He said he did.

She asked if he would like to have some tomato juice brought up to him. He said he would, and Mrs. Houston went downstairs, got the juice and put it on the stairway up by the bathroom because by that time Mr. Houston had gone into the bathroom to wash up.

He came out of the bathroom, drank the tomato juice and then came down the stairs in his bathrobe, and pajamas but without his glasses.

As he came down the stairs his daughter Ann was there putting up a bookshelf, and she was singing, "Oh, What a Beautiful Morning," and Mr. Houston's comment was, "It surely is."

Then Ann said to her father, "We're going to have steak for breakfast." He said, "That is fine," or "Sounds good," or words to that effect, and he walked on through the kitchen in which his wife

was working, and down the stairway leading to the basement. In a few minutes both mother and daughter heard a thud or a shot. Mrs. Houston ran down to the basement and she found Mr. Houston there, shot, and she called to Ann to call the ambulance.

The physical facts show that the shooting happened in the middle of a narrow passageway with a low ceiling. Being a tall man Mr. Houston had to stoop while proceeding through the passageway. The body was found some fifteen to twenty-two feet from the place where the shot was fired, as after he was shot, Mr. Houston struggled this distance.

All of the witnesses familiar with Mr. Houston's habits testified that he kept guns all over his home, that he kept guns loaded from time to time, and that he kept shells all over his home. Mr. Houston was an outdoor type man, a sportsman who was accustomed to handling firearms, and who according to the testimony was careful with firearms. According to members of his family he frequently visited the basement dressed in bathrobe and slippers and it was not unusual for him to do so while awaiting completion of preparation of a meal.

It is defendant's claim that Mr. Houston rested the butt of the rifle on the floor of the basement, bent himself over the rifle parallel to the floor, and placed the muzzle of the gun up to his chest pointing at his heart. The bullet came out lower in Mr. Houston's back than when it entered his chest, which the defense claims shows that the death was

suicide. The defense further claims that Mr. Houston could not possibly have tripped and fallen in view of the physical evidence. The plaintiff on the other hand has suggested several ways in which the shooting may have taken place, all as a result of accident.

The Court has studied all of the cases cited by counsel on both sides, some of which cases will be referred to later in this opinion, and has also reviewed the circumstances of this case including the events leading up to the tragedy and the physical facts themselves, and cannot conclude that the defendant has sustained the burden of proving that Mr. Houston's death was the result of suicide.

Regardless of the question of the burden of proof, if the court was of the view that the evidence presented spelled out but one conclusion, namely suicide, it would not hesitate entering judgment for defendant herein. As stated in *Richardson vs. New York Life Inc.*, 174 F.2d 475 (1949), "A suicide case should be tried as any other case, and metaphysical reasoning about presumptions and burden of proof should not be permitted to obscure the real issue, as has been done in so many cases." However, where the evidence has left the court with the definite view that the shooting may have been the result of accident, as the evidence has in this case, the burden of proof does have significant importance.

A review of some of the cases cited by counsel may be helpful. In practically all of the cases cited the question on appeal was whether the trial court

should have directed a verdict for defendant insurance company.

In *U. S. Fidelity and Casualty Co. vs. Blum*, 270 F. 946, the burden was on plaintiff to prove that death was effected through external, violent and accidental means. Insured had fallen from a window. The evidence showed that he had been greatly disturbed by news of fire occurring in property of his in Alaska which he had learned of 10 days before; insured complained of loss of sleep. Court held that question of suicidal intent was for jury and therefore upheld finding of jury for plaintiff.

In the case of *Long vs. California Western States Life Ins. Co.*, 43 Cal. (2d) 871, there was evidence of a declaration of suicidal intent by assured following an argument with his wife immediately prior to shooting. Question of fact for jury who weighed declarations and physical facts and determined suicide.

In *New York Life Ins. Co. vs. Alman*, 22 F. (2d) 98, the insured, the day before his death, made improper advances to a wife of a friend of his. When husband of woman talked with him about event, insured replied that he, insured, ought to be killed or ought to kill himself. Husband advised him that he was going to expose him, and left. Insured was found dead of a gunshot wound in his chest the next morning. The court noted the presence of motive, and refuted plaintiff's contention that the insured could not have deliberately fired the fatal shot. The court then discussed the factors which illustrate that insured could have deliberately fired the shot, therefore, overcoming this defense. In this case it can be

seen that the court weighed the evidence and felt that the plaintiff (who had the burden of proof) did not sustain it, and that although the possibility of accident was not precluded, it was remote. Therefore, judgment had to be rendered in favor of the party not having the burden of proof.

In *Aetna Life Ins. Co. vs. Tooley*, 16 F. (2d) 243, the insured was fatally wounded in the right temple. The court noted that for a year or more preceding his death insured had been in bad health, and had become obsessed with idea that his friends and associates had ceased to value his friendship. The court held that the presumption against suicide was overcome by a preponderance of the evidence, and reversed judgment for the plaintiff.

In *Burkett vs. New York Life Ins. Co.*, 56 F.2d 105, the burden was on the plaintiff to prove that death of insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means.

Insured was fatally wounded through roof of mouth into brain. He had visited family doctor on day of death, and physician testified that in his opinion the insured was neurotic. The court stated, "The insured's conduct in going for the gun during Sunday afternoon, in taking it and loaded shell without asking permission to do so, and then instead of returning to his home, going to a secluded spot in an urban business and residence locality, was consistent with the existence of suicidal intention * * *."

The particular issue in the present case is whether the wound in Mr. Houston's chest was intentionally or accidentally inflicted. The determination of this issue requires a consideration of all surrounding facts and circumstances. The cases cited by defendant all have one or more vital differences from the facts and circumstances here presented, such as location of the wound, kind of firearms used, and particularly statements indicating suicidal intent.

Defendant's counsel relies heavily on the position of insured's body and gun to establish suicide. Admitting for the sake of argument that these factors are consistent with suicide there is nothing else to support a suicide theory. It is uncontroverted that the gun could have been fired accidentally in one of several ways. The position of gun and body appears equally consistent with the theory of accident to this court.

Defendant refers to statements made by Mrs. Houston right after the shooting contained in the official Police Report made out by Officer Pine. Defendant's reference is to the underlined portions.

"Mrs. Houston said at first that he has periods of depression and was depressed lately. Later, however, she said that over this weekend he had been in fine spirits. She said he was not planning any hunting trip nor planning to do any shooting of any kind. Mrs. Houston pointed out a storeroom downstairs where he had two guns stored. She said also that he kept another gun in the corner of the basement section where he was found dead. Mrs. Hous-

ton said that he had been a hunter and outdoorsman all his life and was not careless with guns."

There is nothing startling or out of the ordinary contained in the wife's statements in that all of these matters were fully developed on the trial of this case. It was testified to that Mr. Houston was customarily a little depressed at this time of the year as he had an annual report to prepare in his business. The wife's statement to Officer Pine, itself, states that her husband was in fine spirits over the weekend.

The fact that Mr. Houston wasn't planning any hunting trip nor any shooting of any kind, does not seem overly significant to the court. There are many and varied reasons why Mr. Houston may have gone down into the cellar and taken this gun without having his own destruction in mind.

All of the witnesses that were familiar with Mr. Houston's habits testified that he was careful with firearms, but that he had said that people were careful with loaded guns and therefore the best way to keep people away from them is to load them and tell people so.

The time and place of the shooting does not in the court's view compel a conclusion of suicide. The facts show that Mr. Houston did on occasion go down into the basement to look at his guns. Defendant notes that the only shell in the gun was the one that was fired, from which it is alleged that the single shell had been inserted in the gun immediately prior to the shooting. However, this assumption is unwarranted in view of uncontroverted

testimony of several witnesses that insured habitually kept loaded guns around the house.

Another factor to be considered is the fact that after the shot was fired, the insured, mortally wounded, crawled 15 or more feet from the narrow passageway in which the shooting took place toward the exit from the basement. In none of the cases cited by counsel did a person bent on self-destruction make any effort to change position after mortally wounding himself.

Other than the physical facts which do not preclude the possibility of accidental death, most of the surrounding facts and circumstances tend to support plaintiff's theory of accident. Motive is not a conclusive element where the physical facts clearly point to suicide, nevertheless many of the cases cited discuss the motive element, if for no other reason than to strengthen conclusions already drawn from the physical facts. In the instant case there is nothing, either in insured's actions or statements which would indicate suicidal intent or disposition. The insured was in good health, was successful in business and had no unusual financial worries or domestic difficulties. He had made definite plans and commitments for both the immediate and more distant future, and all witnesses agreed that insured was one who loved life and had every reason to live.

In the case of *Beers vs. California State Life Ins. Co.*, 87 C.A. 440, appears the following statement: "As is true in its application to the proof of the commission of crime, particularly in the

proof of the crime of murder, the rule is that, while the proof of motive is not indispensable, yet the presence or absence of motive is a circumstance going to the question of the quality of the act under inquiry."

How does this statement apply to the present case? The physical facts do not spell out a clear case of suicide. There is room for speculation as to how the shooting actually took place. Certainly if motive factors were present they would influence the trier of fact as to the quality of the act under inquiry. The court cannot, in view of the physical evidence in this case, and the lack of proof of suicidal motive on the part of insured, come to the conclusion that defendant insurance company has shown by a preponderance of the evidence that insured committed suicide.

The defendant has moved to strike the testimony of Dr. Kirk and Mr. Bradford regarding certain tests made with the gun and bullets involved in the actual accident. The court must first state that it would reach exactly the same decision in this case whether this evidence was presented or not. The tests made were firing experiments and firing tests with the gun in question, with bullets exactly the same as the one that killed Mr. Houston, except that the lead slug had been removed from the gun for safety purposes, which removal in no way affected the tests on the mechanical operation of the gun. This evidence was uncontroverted. The testimony of Dr. Kirk and Mr. Bradford was that this particular firearm due to its mechanical make-up

could be fired by ways other than pulling the trigger, e.g., a blow on the butt or a blow on the hammer.

Defendant relies on *Long vs. Cal. Western States Life Ins. Co.*, supra, and *New York Life Ins. Co. vs. Alman*, supra, to support its contention that this evidence is inadmissible. It is the court's view that neither case precludes the admission of this evidence.

In the *Long* case a ballistic expert was produced to testify as to the results of tests he made tripping and falling with a gun to determine how he could produce wounds such as were inflicted on deceased. The court properly held that a qualified physician was the proper expert to testify relative to wounds which might result from a particular set of physical facts. A ballistic expert was not called in this case to testify as to the mechanical operation of the gun. Further, on the first trial of this case, a physicist, called as a witness for defendant, testified that he made numerous tests to determine whether the gun would discharge accidentally from any type of impact or shock, and that in those tests he was unable to cause the gun to discharge. No objection was made to this testimony nor did the court indicate that it was improper. *Long vs. Cal. Western States Life Ins. Co.*, 111 C.A. 2d 254.

In the *Alman* case results of experiments made with small shot fired from the barrel of the gun while it was held against and away from a cardboard box, were received in evidence for the purpose of showing the spread of shot and the pres-

ence or absence of powder marks, which were compared to those on deceased's body. The court held that for experiments to be admissible they must be made under conditions practically identical with the conditions they purport to illustrate, and that these experiments with the cardboard box should not be admitted in evidence in the event of a retrial.

The court is of the view that the tests made were admissible for the limited purpose of demonstrating that this gun could have been discharged other than by pulling the trigger.

In accord with the foregoing it is hereby Ordered that judgment be entered herein upon findings of fact and conclusions of law in favor of plaintiff and against the defendant, and that the respective parties pay their own costs.

Dated: January 10, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed January 10, 1956.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED MODIFICATIONS
TO PLAINTIFF'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

Pursuant to Rule 21 of the General Rules of Practice, District Court of the United States,

Northern District of California, and without prejudice to or intention to waive its right to contend that findings and judgment should be for Defendant The Canada Life Assurance Company, Defendant proposes the following amendments to the proposed Findings of Fact and Conclusions of Law and Judgment heretofore submitted by plaintiff:

Findings of Fact

1. Page 3, Paragraph IV, add:

“Plaintiff, however, failed to elect to commute said monthly payments and receive such commuted value.”

Reason: There is no evidence of any notice to defendant to elect to commute the monthly payments provided for in said policy.

2. Page 3, Paragraph VIII, substitute the following:

“That it is true, as alleged in defendant’s first affirmative defense, that the written application for life insurance of William Mark Houston to said defendant, dated September 24, 1953, contained representations made by the said William Mark Houston which were false with respect to said William Mark Houston’s use of alcoholic stimulants; that it is not true that all of said statements in said application were untrue and/or were known to said William Mark Houston at the time the same were made to be untrue and false; that it is not true that the provisions of said contract and said policy of life insurance never took effect, but on the contrary the Court finds that while the said

William M. Houston on occasions used alcoholic stimulants to excess, the answers of said insured to the specific question propounded to him in said application were not in his opinion misrepresentations and therefore did not and do not constitute a material misrepresentation with respect to said insured's use of alcoholic stimulants; and the Court further finds that all of said statements in said application were not known by said William M. Houston to be untrue and false, and that the said contract and policy of life insurance upon the life of William M. Houston was a valid, binding, and existing contract in full force and effect on February 22, 1954, the date of the death of said insured."

Reason: To accord with the Court's memorandum opinion holding that the said insured in his opinion did not consider his drinking habits to be excessive or more than occasional.

Conclusions of Law

1. Page 5, Paragraph II, substitute the following:

"That under the terms of said policy of life insurance, plaintiff is entitled to have and recover from said defendant the monthly installments payable thereunder, namely, \$200.00 per month from February 22, 1954, to date of entry of judgment, with interest upon those installments accruing between January 4, 1955 and to date of entry of judgment, at the rate of 7% per annum."

Reasons:

(a) There is no evidence of an election by plaintiff to take the commuted value of the insurance policy. By the terms of California Civil Code Sec. 1449, the right of selection of payment under the said insurance policy is defendant's. Said Sec. 1449 provides as follows:

"If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

(b) Interest, in any event, can only be allowed from date of commencement of this action, January 4, 1955. The policy sued upon provides that "The amount due on the assured's death shall be payable on receipt by the Company at its head office of due proof of such death * * *" And where a claim is not due until the proof of death is furnished, interest is allowable only from the date of commencement of the action, where the complaint merely states that proof of death has been made, without showing when, and where the findings only show that the proof was made before commencement of the action. *Himmelein vs. Supreme Council American Legion of Honor*, 33 P. 1130, 4 C.U. 173.

2. Page 5, Paragraph IV, strike on line 21-22 the words "or any misrepresentation."

3. Page 5, Paragraph VI, substitute the following:

“That plaintiff is entitled to judgment against said defendant in the principal sums of \$1693.32 and of the total of monthly installments accrued, at the rate of \$200.00 per month, from January 4, 1955 to date of entry of judgment, payable on the 22nd day of each month, being....., together with interest on the latter figure at the rate of 7% per annum from January 4, 1955.

Judgment

The amount of the judgment should be amended to accord with the above proposed amendment to plaintiff's Paragraph VI of her proposed Conclusion of Law.

Dated: January 25, 1956.

FRANCIS V. KEESLING, JR.,

HENRY C. CLAUSEN,

HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,

Attorneys for Defendant

Certificate of Service by Mail attached.

JUDGMENT

The above-entitled action having come on regularly for trial before the Court above-named; and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company; and plaintiff

Charlotte S. Houston and defendant The Canada Life Assurance Company having appeared personally and through their respective attorneys; and evidence, both oral and documentary, having been introduced; and the matter having been submitted for decision; and findings of fact and conclusions of law having been duly made and filed herein;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff above-named be and she is hereby granted judgment against defendant The Canada Life Assurance Company in the principal sum of \$28,552.00, together with interest thereon in the amount of \$.; and that plaintiff and said defendant shall each bear their respective costs of suit herein incurred.

Done in Open Court this.day of January, 1956.

.

Chief Judge, U. S. District Court

Acknowledgment of Service attached.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on regularly for trial before the Court above named and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company, and plaintiff Charlotte S. Houston and defendant The Canada

Life Assurance Company having appeared personally and through their respective attorneys, and evidence, both oral and documentary, having been introduced, and the matter having been submitted for decision, and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law.

Findings of Fact

I.

Plaintiff at all times herein mentioned has been and now is a resident of the County of Alameda, State of California, and is the widow of William M. Houston, also known as William Mark Houston.

II.

Prior to February 22, 1954 said William M. Houston was a resident of the City of Berkeley, County of Alameda, State of California. On February 22, 1954 said William M. Houston died at his residence in said city and county as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental cause, to-wit, the accidental discharge of a rifle being carried by said decedent.

III.

On February 22, 1954, said decedent was the named insured of a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953 in the face amount of \$10,000.00, subject to

family income provision therein contained. At the date of issue of said policy, to-wit, November 3, 1953 said William M. Houston, named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. All premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. Plaintiff is the named beneficiary of said life insurance policy and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff has submitted to said defendant, The Canada Life Assurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy.

IV.

Under said family income provision attached to and made a part of said policy No. 1,003,546, issued by said defendant The Canada Life Assurance Company, plaintiff is entitled to receive a guaranteed income of \$200.00 per month, commencing February 22, 1954 and thereafter a like sum on the same day of each month to and including September 24, 1963, together with the sum of \$10,000.00 on September 24, 1963. Said plaintiff further has the right under said policy to elect to commute said monthly payments and receive a commuted value determined as set forth in said policy. The commuted value of said policy is the sum of \$28,552.00.

V.

Defendant, The Canada Life Assurance Com-

pany, has refused to pay plaintiff the amounts payable to plaintiff under and pursuant to the terms of said policy except only the amount of premiums heretofore paid by said decedent thereunder and said defendant disclaims any other or further liability thereunder.

VI.

As to the denials and special defenses set forth in defendant's answer herein, the Court further finds that, except as otherwise expressly herein found, all of the allegations of the first cause of action of plaintiff's complaint are true, and that all the denials and affirmative defenses of said defendant set forth in the answer of said defendant are untrue.

VII.

That it is not true, as alleged in the said defendant's answer to the first alleged cause of action, that the death of William M. Houston resulted from suicide; that on the contrary the Court finds that the death of said William M. Houston was accidental.

VIII.

That it is not true, as alleged in said defendant's first affirmative defense, that the written application for life insurance of William Mark Houston to said defendant, dated September 24, 1953, contained representations made by the said William Mark Houston which were false and fraudulent with respect to said William Mark Houston's use of alcoholic stimulants; that it is not true that

all of said statements in said application were untrue and/or were known to said William Mark Houston at the time the same were made to be untrue and false, and that it is not true that the provisions of said contract and said policy of life insurance never took effect, but on the contrary the Court finds that the use by said William M. Houston of alcohol was neither excessive nor unusual and that the answers of said insured to the general questions propounded to him in said application did not and do not constitute a material misrepresentation or any misrepresentation with respect to said insured's use of alcoholic stimulants, and in fact each of said answers was true and accurate; and the Court further finds that all of said statements in said application were true and were not known by said William M. Houston to be untrue and false, and that the said contract and policy of life insurance upon the life of William M. Houston was a valid, binding and existing contract in full force and effect on February 22, 1954, the date of the death of said insured.

IX.

That it is true, as alleged in defendant's second affirmative defense to said first cause of action, that the said policy of life insurance contained a provision excluding coverage for death occurring within the first two years from the date of issue of said policy by reason of suicide, but on the contrary that said William M. Houston died as a result of a gun shot wound accidentally inflicted.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That said policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953, was a valid, existing, binding contract on February 22, 1954 and that plaintiff, as beneficiary thereunder, is entitled to have and recover from said defendant, the amounts payable thereunder by reason of the accidental death of said insured, William M. Houston, on February 22, 1954.

II.

That under the terms of said policy of life insurance, plaintiff is entitled to have and recover from said defendant the commuted value of said life insurance policy as therein provided, to-wit, the sum of \$28,552.00, with interest thereon at the rate of 7% per annum from February 22, 1954 to date of judgment herein; that said sum is wholly due, owing and unpaid.

III.

That said defendant has failed to establish, and the evidence herein does not sustain, any of the denials set forth in said defendant's answer herein.

IV.

That said defendant has failed to establish, and the evidence herein does not sustain, the first af-

firmative defense set forth in defendant's answer herein; but on the contrary the Court finds that there was no material misrepresentation or any misrepresentation contained in the written application of said William M. Houston or otherwise for such policy of insurance.

V.

That defendant has failed to establish, and the evidence herein does not sustain, the second affirmative defense set forth in defendant's answer herein, but on the contrary the Court finds that the death of said insured was the result of accident and was not the result of suicide.

VI.

That plaintiff is entitled to judgment against said defendant in the principal sum of \$28,552.00, together with interest thereon from February 22, 1954 to date of judgment herein at the rate of 7% per annum.

VII.

That the plaintiff and defendant shall each bear their respective costs of suit herein incurred.

Let judgment be entered accordingly.

Dated:, 1956.

.....,

Chief Judge, U. S. District Court

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED MODIFICATIONS TO PLAINTIFF'S PROPOSED SUPPLEMENTAL AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 21 of the General Rules of Practice, District Court of the United States, Northern District of California, and without prejudice to or intention to waive its right to contend that findings and judgment should be for Defendant, Defendant proposes the following amendments to Plaintiff's Proposed Supplemental and Additional Findings of Fact and Conclusions of Law.

1. Page 1, Paragraph IV, delete, and substitute the following:

"Defendant The Canada Life Assurance Company on the 4th day of May, 1954, received from Plaintiff proofs of decedent's death."

Reason: Plaintiff's proposed amendment does not correctly set forth any stipulation made by defendant during the course of the trial. However, the fact is that proofs of death were received by defendant on May 4, 1954. It is this fact, rather than the alleged stipulation, on which a finding should be made.

2. Page 2, Paragraph II, delete, and substitute the following:

"On January 4, 1954, was the sum of \$28,552.00. Under the terms of said policy of life insurance No. 1,003,546 said plaintiff Charlotte S. Houston,

as the beneficiary named in said policy, at the election of said plaintiff, was entitled to receive the commuted value of said policy in lieu of the family income provisions hereinabove set forth. Said Plaintiff gave Defendant no notice of her election to take and receive said commuted value other than by filing and serving her complaint herein, in which by the prayer thereof she asked damages in the sum of \$27,390.00 plus interest thereon at the rate of 7% per annum from February 22, 1954, to date of judgment. The Court specifically finds that Defendant in Paragraph IV of its Answer to said complaint denied that Plaintiff has any rights to said commuted value. Both by said allegation and by its Proposed Modifications to Plaintiff's Proposed Findings of Fact and Conclusions of Law and Judgment said defendant raised objection to plaintiff's request for the commuted value in lieu of monthly payments as provided in said policy."

Reasons:

(a) Plaintiff's proposed supplemental and additional finding seeks as damages interest upon a sum not prayed for and not payable until the receipt by Defendant of a Notice of Selection, which Defendant has as yet not received. Civil Code §1449 specifically requires the giving of notice of selection by the party having the right of selection between alternative acts, otherwise the right of selection vests in the other party. There is no evidence of the receipt by Defendant of such a notice of selection, unless the complaint served herein on January 4, 1954, may be so considered.

(b) The remainder of Plaintiff's proposed supplemental and additional finding is untrue as demonstrated by the above proposed modification.

3. Page 3, Paragraph III, delete line 6 thereof, and substitute the following:

"January 4, 1954."

Reason: Assuming that the complaint suffices as notice of selection, as Plaintiff contends in Paragraph II of her Proposed Supplemental and Additional Findings of Fact and Conclusions of Law, then in any event interest should be allowed upon the principal sum only from January 4, 1954, the date of service of the complaint.

Interest as damages is allowable only where damages certain are vested upon a particular day, in which case interest may be recovered from that particular day. Civil Code §3287. The only day on which the obligation of Defendant became fixed, under plaintiff's admission in Paragraph II of her Proposed Supplemental and Additional Findings of Fact, is the date of service of the summons and complaint.

4. Page 3, Paragraph IV, should be modified as set forth in Defendant's Paragraph III above.

Dated: February 7, 1956.

FRANCIS V. KEESLING, JR.,
HENRY C. CLAUSEN, and
HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 7, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED SUPPLEMENTAL
AND ADDITIONAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Comes now plaintiff above named, Charlotte S. Houston, and respectfully requests the following supplemental and additional findings of fact and conclusions of law in addition to those proposed in said plaintiff's proposed Findings of Fact and Conclusions of Law heretofore filed in the above entitled action:

I.

Plaintiff respectfully requests that paragraph III, page 2 of said proposed Findings of Fact be amended and changed by inserting after the word "Plaintiff" on line 21, the following: " , on May 4, 1954,"; and further inserting on line 24 of said paragraph III, page 2, after the words "of said policy" the following:

"and defendant Canada Life Assurance Company at the trial of this action stipulated that said proof of loss and claim was dated April 16, 1954 and was filed with and received by said defendant Canada Life Assurance Company on said 4th day of May, 1954 and that said proof of loss and claim was in proper form, as required by said defendant in said policy No. 1,003,546 and amendments thereto, and that said defendant raised no question as to the proof of loss from a technical standpoint and the only defenses urged in said action and at the time

of trial were the affirmative defenses of said defendant, namely, the defense that the insured had committed suicide and had made misrepresentations as to the extent of his drinking in his application for insurance.”

II.

Plaintiff respectfully requests that paragraph IV, page 3 of said proposed Findings of Fact be amended and changed by inserting after the words “said policy” on line 4, the following:

“at the date of death was and is the sum of \$28,552.00 and under the terms of said policy of life insurance No. 1,003,546 said plaintiff Charlotte S. Houston, as the beneficiary named in said policy, at the election of said plaintiff, was entitled to receive the commuted value of said policy in lieu of the family income provisions hereinabove set forth; that said plaintiff Charlotte S. Houston elected to take and receive said commuted value of said life insurance policy in accordance with the terms of said policy and amendments thereto in her complaint herein and the prayer thereof. The Court further finds that defendant Canada Life Assurance Company made no objection during the trial or at any other time to plaintiff’s request and prayer in said complaint that plaintiff recover said commuted value in the sum of \$28,552.00 in lieu of monthly payments as provided in said policy.”

III.

Plaintiff respectfully requests that paragraph II on page 5 of the Conclusions of Law be amended

by striking "February 22, 1954" on line 11, and inserting in lieu thereof "May 4, 1954."

IV.

Plaintiff respectfully requests that paragraph VI on page 6 of the Conclusions of Law be amended by striking "February 22, 1954" on line 2, and inserting in lieu thereof "May 4, 1954".

Respectfully submitted this 2nd day of February, 1956.

/s/ PHILIP H. ANGELL,
/s/ ROBERT M. ADAMS, JR.,
/s/ PHILIP H. ANGELL, JR.,
/s/ ANGELL and ADAMS,
/s/ By PHILIP H. ANGELL,
Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed February 8, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action having come on regularly for trial before the Court above named and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company, and plaintiff

Charlotte S. Houston and defendant The Canada Life Assurance Company having appeared personally and through their respective attorneys, and evidence, both oral and documentary, having been introduced, and the matter having been submitted for decision, and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Plaintiff at all times herein mentioned has been and now is a resident of the County of Alameda, State of California, and is the widow of William M. Houston, also known as William Mark Houston.

II.

Prior to February 22, 1954 said William M. Houston was a resident of the City of Berkeley, County of Alameda, State of California. On February 22, 1954 said William M. Houston died at his residence in said city and county as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental cause, to-wit, the accidental discharge of a rifle being carried by said decedent.

III.

On February 22, 1954, said decedent was the named insured of a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3,

1953 in the face amount of \$10,000.00, subject to family income provision therein contained. At the date of issue of said policy, to-wit, November 3, 1953 said William M. Houston, named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. All premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. Plaintiff is the named beneficiary of said life insurance policy and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff on May 4, 1954 has submitted to said defendant, The Canada Life Assurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy, and defendant Canada Life Assurance Company at the trial of this action stipulated that said proof of loss and claim was dated April 16, 1954 and was filed with and received by said defendant Canada Life Assurance Company on said 4th day of May, 1954 and that said proof of loss and claim was in proper form, as required by said defendant in said Policy No. 1,003,546 and amendments thereto, and that said defendant raised no question as to the proof of loss from a technical standpoint and the only defenses urged in said action and at the time of trial were the affirmative defenses of said defendant, namely, the defense that the insured had committed suicide and had made misrepresentations as to the extent of his drinking in his application for insurance.

IV.

Under said family income provision attached to and made a part of said policy No. 1,003,546, issued by said defendant The Canada Life Assurance Company, plaintiff is entitled to receive a guaranteed income of \$200.00 per month, commencing February 22, 1954 and thereafter a like sum on the same day of each month to and including September 24, 1963, together with the sum of \$10,000.00 on September 24, 1963. Said plaintiff further has the right under said policy to elect to commute said monthly payments and receive a commuted value determined as set forth in said policy. The commuted value of said policy at the date of death was and is the sum of \$28,552.00 and under the terms of said policy of life insurance No. 1,003,546 said plaintiff Charlotte S. Houston, as the beneficiary named in said policy, at the election of said plaintiff, was entitled to receive the commuted value of said policy in lieu of the family income provisions hereinabove set forth; that said plaintiff Charlotte S. Houston elected to take and receive said commuted value of said life insurance policy in accordance with the terms of said policy and amendments thereto in her complaint herein and the prayer thereof. The Court further finds that defendant Canada Life Assurance Company made no objection during the trial or at any other time to plaintiff's request and prayer in said complaint that plaintiff recover said commuted value in the sum of \$28,552.00 in lieu of monthly payments as provided in said policy.

V.

Defendant, The Canada Life Assurance Company, has refused to pay plaintiff the amounts payable to plaintiff under and pursuant to the terms of said policy except only the amount of premiums heretofore paid by said decedent thereunder and said defendant disclaims any other or further liability thereunder.

VI.

As to the denials and special defenses set forth in defendant's answer herein, the Court further finds that, except as otherwise expressly herein found, all of the allegations of the first cause of action of plaintiff's complaint are true, and that all the denials and affirmative defenses of said defendant set forth in the answer of said defendant are untrue.

VII.

That it is not true, as alleged in the said defendant's answer to the first alleged cause of action, that the death of William M. Houston resulted from suicide; that on the contrary the Court finds that the death of said William M. Houston was accidental.

VIII.

That it is not true, as alleged in said defendant's first affirmative defense, that the written application for life insurance of William Mark Houston to said defendant, dated September 24, 1953, contained representations made by the said William Mark Houston which were false and fraudulent with respect to said William Mark Houston's use

of alcoholic stimulants; that it is not true that all of said statements in said application were untrue and/or were known to said William Mark Houston at the time the same were made to be untrue and false, and that it is not true that the provisions of said contract and said policy of life insurance never took effect, but on the contrary the Court finds that the use by said William M. Houston of alcohol was neither excessive nor unusual and that the answers of said insured to the general questions propounded to him in said application did not and do not constitute a material misrepresentation or any misrepresentation with respect to said insured's use of alcoholic stimulants, and in fact each of said answers was true and accurate; and the Court further finds that all of said statements in said application were true and were not known by said William M. Houston to be untrue and false, and that the said contract and policy of life insurance upon the life of William M. Houston was a valid, binding and existing contract in full force and effect on February 22, 1954, the date of the death of said insured.

IX.

That it is true, as alleged in defendant's second affirmative defense to said first cause of action, that the said policy of life insurance contained a provision excluding coverage for death occurring within the first two years from the date of issue of said policy by reason of suicide, that it is not true that said William M. Houston died as a result

of suicide, but on the contrary that said William M. Houston died as a result of a gun shot wound accidentally inflicted.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That said policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953, was a valid, existing, binding contract on February 22, 1954 and that plaintiff, as beneficiary thereunder, is entitled to have and recover from said defendant, the amounts payable thereunder by reason of the accidental death of said insured, William M. Houston, on February 22, 1954.

II.

That under the terms of said policy of life insurance, plaintiff is entitled to have and recover from said defendant the commuted value of said life insurance policy as therein provided, to wit, the sum of \$28,552.00, with interest thereon at the rate of 7% per annum from May 4, 1954 to date of judgment herein; that said sum is wholly due, owing and unpaid.

III.

That said defendant has failed to establish, and the evidence herein does not sustain, any of the denials set forth in said defendant's answer herein.

IV.

That said defendant has failed to establish, and the evidence herein does not sustain, the first affirmative defense set forth in defendant's answer herein; but on the contrary the Court finds that there was no material misrepresentation or any misrepresentation contained in the written application of said William M. Houston or otherwise for such policy of insurance.

V.

That defendant has failed to establish, and the evidence herein does not sustain, the second affirmative defense set forth in defendant's answer herein, but on the contrary the Court finds that the death of said insured was the result of accident and was not the result of suicide.

VI.

That plaintiff is entitled to judgment against said defendant in the principal sum of \$28,552.00, together with interest thereon from May 4, 1954 to date of judgment herein at the rate of 7% per annum.

VII.

That the plaintiff and defendant shall each bear their respective costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: February 8, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed February 8, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 34,395

CHARLOTTE S. HOUSTON, Plaintiff,

vs.

THE CANADA LIFE ASSURANCE COMPANY, et al., Defendants.

JUDGMENT

The above entitled action having come on regularly for trial before the Court above named; and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company; and plaintiff Charlotte S. Houston and defendant The Canada Life Assurance Company having appeared personally and through their respective attorneys; and evidence, both oral and documentary, having been introduced; and the matter having been submitted for decision; and findings of fact and conclusions of law having been duly made and filed herein;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff above named be and she is hereby granted judgment against defendant The Canada Life Assurance Company in the principal sum of \$28,552.00, together with interest thereon from May 4, 1954 to February 8, 1956 at the rate of 7% per annum, or the sum of

\$3,531.84 interest; and that plaintiff and said defendant shall each bear their respective costs of suit herein incurred.

Done in Open Court this 8th day of February, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court

Entered in Civil Docket 2/9/56.

[Endorsed]: Filed February 8, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Canada Life Assurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 8, 1956.

Dated: February 23, 1956.

FRANCIS V. KEESLING, JR.,
HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendant

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Canada Life Insurance Company, herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered February 8, 1956 by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Canada Life Insurance Company, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on ac-

count of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 1st day of March, 1956.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By ROYDEN C. TOMLINS,
Attorney-in-Fact

Notary Public Certificate attached.

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the Defendant, The Canada Life Assurance Company, in the above-entitled action has appealed to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered against said Defendant in said action, in the said District Court, in favor of the plaintiff in said action, on the 8th day of February, 1956 for Twenty-eight Thousand Five Hundred Fifty-two and no/100 (\$28,552.00) Dollars and interest in the amount of Three Thousand Five Hundred Thirty-one and 84/100 (\$3,531.84) Dollars.

Whereas, the Appellant is desirous of staying the execution of the said Judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, The Canada Life Assurance Company, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, as Surety, do hereby acknowledge themselves justly bound in the sum of Thirty-Six Thousand and No/100 Dollars (\$36,000.00), jointly and severally, firmly by these presents, to the effect that if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the Appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all such costs, interest and damages as the Appellate Court may adjudge and award.

And, Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

In Witness Whereof, the seal and signature of said Principal is hereto affixed and the corporate

name of the said Surety is hereto affixed by its duly authorized officer at San Francisco, California, this 1st day of March, 1956.

THE CANADA LIFE ASSURANCE
COMPANY,

/s/ By [Illegible]

Branch Manager, San Francisco,
Calif.

[Seal] FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

/s/ By ERBON DELVENTHAL,
Attorney-in-Fact

Notary Public Certificate attached.

Approved:

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the defendants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by notice of appeal filed on the 6th day

of February, 1956, the entire record of all proceedings and evidence in this action.

FRANCIS V. KEESLING, JR.,

HENRY C. CLAUSEN,

HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN,

Attorneys for Defendant The Canada Life Assurance Company

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

EXCERPTS FROM DOCKET ENTRIES

1955

Jan. 14—Filed petition on removal with copy of complaint and summons attached (by The Canada Life Assurance Company).

Jan. 14—Filed Bond on removal in sum \$250.00.

Jan. 18—Filed transcript on removal by Jefferson Standard Life Ins. Co. and N. Y. Life Ins. Co. with summons and complaint attached.

Jan. 18—Filed bond on removal by Jefferson Std. and N. Y. Life Ins. Co.

Jan. 18—Filed cost bond by defts. Jefferson Std. and N. Y. Life Ins. Co.

* * * * *

Jan. 27—Filed notice by Jefferson Std. Life Association of Bledsoe, Smith & Cathcart as counsel.

* * * * *

1955

Mar. 10—Filed answer of New York Life Insurance Company.

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Mar. 24—Filed answer of Jefferson Standard Life Ins. Co.

* * * * *

Apr. 5—Filed answer of The Canada Life Assurance Company.

Apr. 9—Filed notice and motion by plaintiff to strike from answer of Canada Life Assurance Co. April 18, 1955, with supporting memo.

Apr. 18—Ordered motion to strike from answer off calendar (no appearances) (Judge Hamlin).

* * * * *

June 20—Ordered for trial Sept. 26, 1955. (Judge Murphy).

* * * * *

July 13—Ordered trial continued to Nov. 7, 1955. (Judge Murphy).

* * * * *

Oct. 5—Filed order dismissal as to New York Life Insurance Company, with prejudice and without costs (Judge Harris).

Oct. 20—Filed dismissal by plaintiff with prejudice as to Jefferson Standard Life Insurance Company.

* * * * *

Nov. 7—Ordered case assigned to Judge Roche for trial this date (Judge Harris. Court trial Nov. 7, 8, 9, 10, 14 and 15, 1955. (Judge Roche)

* * * * *

1955

Dec. 5—Ordered case submitted (Judge Roche).

1956

Jan. 10—Filed memo. opinion of Court (Judgment for plaintiff. Counsel to prepare findings, conclusions and form of judgment) (Judge Roche).

* * * * *

Jan. 26—Filed proposed modification of findings and conclusions, by deft.

* * * * *

Feb. 7—Filed defendant's proposed modifications to supplemental and additional findings and conclusions by plaintiff.

* * * * *

Feb. 8—Filed proposed supplemental findings and conclusions by plaintiff.

Feb. 8—Filed findings of fact and conclusions of law (Judge Roche).

Feb. 9—Entered judgment—filed Feb. 8, 1956—for Charlotte S. Houston vs. Canada Life Assurance Company in sum \$28,552.00 with \$3,531.84 interest to Feb. 8, 1956. No costs allowed. (Judge Roche)

Feb. 9—Mailed notices.

Mar. 6—Filed notice of appeal by Canada Life Assurance Co.

Mar. 6—Filed cost bond on appeal in sum \$250.00.

Mar. 6—Filed supersedeas bond in sum \$36,000.00, "Approved, Michael J. Roche, Chief U. S. Dist. Judge."

1956

Mar. 6—Filed appellant's designation of record on appeal.

Mar. 7—Mailed notices.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for Removal by The Canada Life Assurance Company from Superior Court of the State of California in and for the County of Alameda, with copy of summons and complaint attached.

Bond on Removal.

Petition for Removal by Jefferson Standard Life Insurance Company, a Corporation and New York Life Insurance Company, a corporation, from Superior Court of the State of California in and for the County of Alameda, with copy of summons and complaint attached.

Bond on Removal.

Bond for Security for Costs.

Notice of Association of Counsel.

Answer of New York Life Insurance Company with copy of Policy of Insurance attached.

Answer of Jefferson Standard Life Insurance Company.

Answer of The Canada Life Assurance Company with copy of Policy of Insurance attached.

Notice and Motion of Plaintiff to Strike from Answer of The Canada Life Assurance Company, with supporting memo and affidavit.

Dismissal of action as to New York Life Insurance Company.

Dismissal of action as to Jefferson Standard Life Insurance Company.

Memorandum Opinion of Court.

Proposed modifications by defendant to findings of fact and conclusions of law proposed by plaintiff.

Proposed modifications by defendant to supplemental and additional findings of fact and conclusions by law proposed by plaintiff.

Proposed supplemental and additional findings of fact and conclusions of law by plaintiff.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Supersedeas Bond on Appeal.

Appellant's Designation of Record on Appeal.

Reporter's Transcript of Proceedings, Nov. 7, 8, 9, 10, 14.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

Defendant's Exhibits A, B, C, D, E, G, H, I, J, and K and L.

(Defendant's Exhibit F, Police Department Records, withdrawn.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of April, 1956.

[Seal] C. W. CALBREATH,
 Clerk
/s/ By MARGARET P. BLAIR,
 Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 34395

CHARLOTTE S. HOUSTON, Plaintiff,

vs.

THE CANADA LIFE ASSURANCE COMPANY,
et al., Defendants.

REPORTER'S TRANSCRIPT

November 7, 1955, 10:00 a.m.

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Angell & Adams, by Philip H. Angell, Esq.; Robert M. Adams, Esq.; Philip H. Angell, Jr., Esq. For the Defendant:

Keesling & Keesling, by Henry C. Clausen, Esq. and Henry C. Clausen, Jr., Esq. [1*]

The Clerk: Houston versus The Canada Life, for trial.

Mr. Clausen: Ready for the defendant.

Mr. Angell: Ready for the plaintiff.

The Court: Proceed.

Mr. Angell: If your Honor please, this is a complaint, which is very simple, the issues will be very simple here, and I think the factual data also. The complaint is an action brought upon a life insurance policy, the insured having died by gunshot wound about eight months after the issuance of the policy. The policy was issued by The Canada Life Assurance Company in—I believe it was in November, the 3rd, of 1953, and the death occurred in February of 1954.

The complaint alleges the death of the assured, it sets forth the terms of the insurance contract with Canada Life, and also joins two other insurance companies, your Honor, the New York Life and the Jefferson Insurance Company, both defendants, the latter defendants having been dismissed, the action as to them, there having been a settlement with the defendants before this trial.

I might say that the issues with respect to the two that were dismissed were somewhat different from those of the Canada Life. The Canada Life policy is defended upon the ground that the death was due to

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

suicide, and there was a suicide clause [4] in the policy that did not assume that risk, and there would be nothing due under the policy if death was due to a suicide. The second affirmative defense pleaded by the defendant is that there was misrepresentation in the application for the insurance in that the assured stated that he only used alcoholic beverages occasionally and socially and not to excess, and the answer in the affirmative defense states that that was untrue and misrepresentation, that the assured did use alcoholic beverages to excess and more than socially, occasionally.

The plaintiff in this case will show your Honor that the circumstances surrounding the death—although I believe that under the cases upon the admitted facts in the pleadings the plaintiff would not be required to go forth at this time, because the making of the insurance contract is admitted, the death is admitted, and while there is a statement that due proof is not made, I think that is a formal denial, I think that it will be admitted that proof was filed, but it was claimed that the proof did not state that the death was due to suicide and it was accidental and hence was not adequate. There was no demand for further proof and hence I assume that that comes under their first or second affirmative denial on the ground that they claim the deceased met his death by suicide. However, I think it would be more orderly and to the interest of all parties for us to proceed to show the [5] circumstances immediately prior to the date of the deceased's death and to go into the facts which preceded the date of death and on the date of death, and we think those facts

will show conclusively to this court that not only was this an accidental death but in addition there was no excessive use of alcohol by this assured and no representations made.

Mr. Clausen: Your Honor, just a word, if I may, to outline the defendant's position. The policy of The Canada Life Assurance Company that is here involved makes available to the defendant the two special defenses which have been alleged. No. 1, that the insured committed suicide, and, No. 2, that in any event, regardless of the suicide episode, the fact was that, as found out later in the investigation following the suicide, it was disclosed that he had made material misrepresentations in any event in his application for the insurance in respect of drinking habits. Your Honor, the policy application was made by the insured at Lakeview, Oregon, in the latter part of 1953 and the death of the insured occurred within a few months thereafter, Washington's Birthday of last year, 1954.

Very briefly, your Honor, in regard to the proof that the insured did commit suicide on this occasion, I am not going to outline the facts to you, but I will state that the physical facts alone, your Honor, demonstrate that it was intentional self-destruction. [6]

With regard to the other defense of material misrepresentations, answers were given to the questions as to drinking and the insured said he only drank occasionally and never used them, intoxicants, to excess. Well, the facts will show, your Honor, that that was a material misrepresentation, and so with that proof on either one of those grounds we ask the

court, at the proper time, for a judgment for the defendant.

With regard to the order of proof, your Honor, we are prepared to proceed at this time.

Mr. Angell: We have no objection to your proceeding. We think that is a more orderly procedure, Mr. Clausen.

There are a couple of amendments, I would like to ask your stipulation, on the face, that since the filing of this complaint the plaintiff, Mrs. Houston, has been married and her name now is Charlotte Houston Clayton.

Mr. Clausen: What is the name?

Mr. Angell: Clayton, C-l-a-y-t-o-n.

Mr. Clausen: Clayton. We have no objection to that amendment, your Honor.

Mr. Angell: And it will be made on the face of the complaint.

For the purpose of the record downstairs, I think we will file with the Clerk and serve on Mr. Clausen just a document showing it, so it will be in your file for [7] convenience.

The other stipulation we would like—I think it is already covered in the pleadings—and that is that the complaint alleges the commuted value of this insurance as \$27,390. The answer states that the commuted value is \$28,552.

By that we mean, your Honor, the averment of the insurance was that upon the death of the assured if the death was not due to suicide or if there was no fraud, the widow was entitled to \$200.00 a month for ten years, and then upon the expiration of those ten

years the payment of a flat sum of \$10,000, and that the commuted value, as alleged in the answer, is \$28,552.

In our complaint we miscalculated that commuted value. The schedule for figuring is in the policy. But, may it be stipulated that the answer is correct and that the commuted value of that policy will be \$28,552?

Mr. Clausen: You are speaking solely as the figure which would be derived from the policy itself?

Mr. Angell: Oh, yes.

Mr. Clausen: Well, whatever the policy shows is correct and I assume therefore that the answer is certainly correct and we have the original policy right here.

Mr. Angell: Paragraph IV of the answer alleges the commuted value is \$28,552 as of February 22, 1954, which is [8] the date of the death.

Mr. Clausen: In other words, what you are saying is that our answer contains the correct figure and you wish to put that in your complaint?

Mr. Angell: That's correct. There would be no issue on that.

Mr. Clausen: I have no objection to that.

The Court: The record so shows.

Mr. Angell: As to the order of proof, Mr. Clausen said he is ready to proceed on the affirmative defenses. We have no objection to his proceeding.

Mr. Clausen: We will call, your Honor, first, Mr. Parker.

EDWIN F. PARKER

called as a witness on behalf of the defendants;
sworn.

The Court: What is your full name?

The Witness: Edwin F. Parker.

The Court: Where do you reside?

The Witness: At 2516 Ashby Avenue, Berkeley, California.

The Court: Your business or occupation?

The Witness: Retired the first of October, Berkeley Police Department. I am in retirement status at the present.

The Court: Berkeley Police Department.

The Witness: Yes, sir.

The Court: What capacity?

The Witness: Inspector. [9]

The Court: Take the witness.

Direct Examination

Q. (By Mr. Clausen): How long, Mr. Parker, were you an officer connected with the Berkeley Police Department?

A. A little over twenty-five years.

Q. Twenty-five years. In this particular matter that we are concerned with, did you make an investigation concerning the death of the party named, Houston, Mr. Houston, in this case?

A. Yes, sir, I did.

Q. Can you tell me in point of time when that was, what date that was?

A. The 22nd of February, 1954, and I arrived at

(Testimony of Edwin F. Parker.)

the residence involved about two-thirty in the afternoon.

Q. You arrived at the scene about two-thirty in the afternoon? A. Yes.

Q. What did you do when you arrived there, Mr. Parker?

A. I talked to Officer Pine of the Berkeley Police Department who was already present and made an inspection of the premises and of the body without moving the body at that time.

Q. Did you in the course of the official investigation make some notes, Mr. Parker?

A. I made notes at the time, which were later—which I typed up myself later or dictated them—I don't recall which. I don't have the original notes that were made at that time. [10]

Q. Do you have a copy, Mr. Parker, from which you—do you have something that you typed up from those notes?

A. No. I have a—just a brief handwritten memorandum of the date and the time and the rifle involved, but not a copy of the report.

Q. What is it that you have there, Mr. Parker?

A. Just a few miscellaneous notes that I made from my original report.

Q. And did you make these notes shortly after the investigation?

A. I dictated the report and signed it immediately after the investigation. The notes that you have there were made, I believe it was Friday of last week.

(Testimony of Edwin F. Parker.)

Q. I see.

A. Made from the original signed report which I dictated.

Q. Where is that original signed report, Mr. Parker?

A. It is in the files of the Berkeley Police Department.

Q. Would you bring that over?

A. I am not permitted to remove reports from the file, counsel, if you please.

Q. Well, the court has jurisdiction over the matter of records in police departments, I believe, and I would ask your Honor's authorization—from the court—to ask the officer to bring that on the recess of the court, say over the noon hour. [11]

Mr. Angell: If your Honor please, we have two objections. No. 1, these reports are not admissible in evidence. No. 2, that they are confidential within the police department. And, No. 3, that Inspector Parker is no longer connected with the police department. And the proper method of approaching is known to Mr. Clausen as well as myself. And directing this officer, who is not now an officer therein, in the police department—even if he were—to produce something without issuing a subpoena duces tecum directed to the keeper of those records, I will have to say that I don't think it should be done. I don't think this witness could. Could you, Inspector Parker?

A. It would be in violation of the department's

(Testimony of Edwin F. Parker.)

records for me to remove any document from the file.

Mr. Angell: You are a retired officer?

A. I am a retired officer.

Mr. Angell: You have no access to those records?

A. I am not on active duty.

Mr. Angell: Other than those given you by request, is that right?

A. Only by request of the court to the keeper of the records.

Mr. Clausen: Your Honor, the other officer involved, Pine, I believe is still with the department. In any event, he is here in the courtroom and I would then ask Officer Pine, when he takes the stand, that the court ask Officer Pine to [12] bring over the investigation reports of himself and Officer Parker.

The Court: You better withdraw this witness and call him to the stand and have him sworn.

Mr. Clausen: Yes, your Honor.

The Court: Step down.

Mr. Clausen: Step down, Mr. Parker.

(Witness excused.)

Mr. Clausen: Officer Pine, would you take the stand, please?

KENNETH C. PINE

called on behalf of the defendants; sworn.

The Court: Your full name, please.

A. My name is Kenneth C. Pine.

The Court: Where do you reside?

(Testimony of Kenneth C. Pine.)

A. 1767 Ardeth Drive in Concord.

The Court: Concord?

A. Concord—Pleasant Hill.

The Court: Your business or occupation?

A. I am a police patrolman for the City of Berkeley.

The Court: How long have you been so engaged?

A. Thirteen and a half years.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Clausen): Officer Pine, do you recall in 1954 [13] being called to make an investigation concerning a death at the home of Mr. Houston?

A. Yes, I do.

Q. Do you recall the date and the time that you arrived at the scene?

A. It was on the 22nd of February, and I arrived there at approximately 2:15.

Q. And in the course of the investigation done by yourself did you meet with Mr. Parker, who was just on the stand?

A. Yes. He came shortly after I did.

Q. You were both then employed by the City of Berkeley Police Department? A. Yes.

Q. And the premises that we are concerned with were located where, Mr. Pine—the address?

A. (Witness referring to his notes.) 1082 Miller Avenue in Berkeley.

Q. In Berkeley? A. Yes.

Q. Did you make a written report?

(Testimony of Kenneth C. Pine.)

A. Yes, I did.

Q. Did that written report go in to your superiors? A. Yes.

Q. And were some pictures also taken of the body that was there found? [14]

A. Yes.

Q. Do you have that written report with you or a copy? A. No, I don't.

Q. And is it available in the department of the Berkeley Police?

A. It is available if properly requisitioned or subpoenaed.

Q. All right. A. I believe.

Mr. Clausen: Your Honor, we will ask the court to ask the officer to bring over, following the noon recess, the investigation report of himself, of Mr. Parker, and the pictures taken.

The Court: You will have to get your subpoena for him.

Mr. Clausen: All right.

The Witness: It will have to be submitted to my superior officer in the form of a subpoena.

The Court: Yes.

Mr. Clausen: Very well.

Q. Now, with regard to the incident itself——

Mr. Angell: I will assist you, so that subpoena be directed to the right officer, I am informed this officer ought to know, that Officer Sherry—he is a lieutenant—is in charge of records at Berkeley Police Department and the subpoena should issue to him.

Am I correct? [15]

(Testimony of Kenneth C. Pine.)

A. He is in charge of records, but I believe the subpoena should be made to the chief, Holstrom.

Q. (By Mr. Clausen): Chief of Police Holstrom? A. Holstrom.

Q. All right. When you arrived at the scene what did you find there, Mr. Pine?

A. There was another officer who arrived shortly ahead of me, Officer Chandler.

Q. Chandler?

A. And he was in—yes, H. C. Chandler.

Q. And Officer Chandler was connected, was he, with what department?

A. Berkeley Police Department.

Q. All right.

A. He was in the basement where Mr. Houston's body was found; where it was found on the floor.

Q. What did you see when you arrived then, Mr. Pine?

A. Well, I saw Mr.—this body, who I later found out to be Mr. Houston, lying on the floor in the basement.

Q. And what is it that you are holding in your hand there?

A. I have some notes that I made at the time.

Q. That you made at the time you were there?

A. Yes.

Q. May I see those, please?

A. Their names and addresses, certain facts (producing and [16] handing counsel).

Q. All right.

(Testimony of Kenneth C. Pine.)

The Court: You made at the scene of this occurrence?

A. Yes, wrote them while there, except for the final page, which was made about a month or so later at an inquest. That particular page was not made at the scene. That was further——

Q. (By Mr. Clausen): You are speaking of this third page? A. Yes.

Mr. Clausen: I have no objection to your refreshing your recollection, if you need, from those notes.

Q. Where in the house was the body, Mr. Pine?

A. There is a basement section to the rear of the house, accessible by way of a stairway from the kitchen, and an outside doorway on the south side of the house.

Q. And here on the blackboard is a diagram supplied by plaintiff's counsel this morning. Would you tell me the approximate position in respect of the diagram where the body was when you found it?

Mr. Angell: If your Honor please——

The Court: I suggest that you familiarize the witness with the diagram.

Mr. Angell: May I suggest, for the record, so we can refer to it by some exhibit number, that we call it—I have no objection to calling it Plaintiff's A for identification.

The Court: No objection? [17]

Mr. Clausen: No objection.

Mr. Angell: Even in evidence, if you wish.

The Court: Let it be so marked.

(Testimony of Kenneth C. Pine.)

(Large diagram on blackboard marked for identification Plaintiff's Exhibit 1.)

Q. (By Mr. Clausen): Now, Mr. Pine, with respect to the premises here. Step to the board. Are you able to recollect, with reference to the diagram——

The Court: There is a pointer down there. You might step aside so I can follow.

Q. (By Mr. Clausen): It indicates here "Stairs" — "Closet" under stairway — "Closet" — "Servant's Room"—. The map is drawn with north in the direction that I am now pointing. "Hanging laundry" on this side. "Table." "Hole cut in floor." "Bedding."

Now, with reference to that diagram, can you tell me this, are you able to locate the general area where you found the body, when you saw the body?

A. Yes, sir.

Q. Where would that be? Would you point to that?

A. To my recollection, it was right in this approximate position, the head pointing this way, alongside of the ironer.

The Court: Alongside what?

A. Alongside the ironer, with the head pointing approximately east. [18]

Q. (By Mr. Clausen): Did you then see a gun there?

A. Yes, I saw a gun in the approximate position—right over in this area.

Mr. Angell: If your Honor please, I would suggest, in the interest of clarity in the record, that

(Testimony of Kenneth C. Pine.)

each time the witness fixes a location of anything that he put his initial down starting with "1" or "A" and then mark what it is, so that when other witnesses get here and put their testimony in we will be able to keep track of our record in the case.

Mr. Clausen: I was going to do that, Mr. Angell, but in fairness to the witness I wanted the witness first to familiarize himself with this diagram.

Q. You haven't seen this diagram before, have you? A. No, I haven't. I have my own.

Q. You have one of your own?

A. A rough diagram (witness producing).

Q. Well, I will ask you to refer, then, if you will, to your own diagram for recollection purposes and to draw in on the diagram on the board, Plaintiff's 1, the figure, as near as you can recall, of the body of Mr. Houston when you saw it on arriving there.

Mr. Angell: May the record show that the witness is using a red crayon for designative ease.

The Court: The record will also show.

Mr. Clausen: I am also going to mark this, if the court [19] please, "P-1."

(Counsel designating P-1 on diagram, Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Clausen): With that same crayon would you draw where you saw the gun?

A. It may be out of proportion, but that is it approximately (indicating).

Mr. Clausen: I will mark this "P-2."

(Counsel marking on Plaintiff's 1 for identification designation "P-2.")

(Testimony of Kenneth C. Pine.)

Mr. Clausen: Resume the stand, please.

Q. When you arrived there, Mr. Pine, who else was down in the basement?

A. Officer Chandler was and the ambulance crew. There were two men, the——

Q. The ambulance crew?

A. The ambulance crew.

Q. When you arrived it was what time?

A. Approximately 2:15 or thereabouts.

Q. Did you make an observation to determine where the gun had been fired?

A. To some extent. Where the gun lay there was a mark of blood on the floor.

Q. In other words, at the point where you have indicated on this diagram, Plaintiff's 1, and your mark P-2, you say there [20] was some blood?

A. Yes, on the floor at that place.

Q. Did you make any observation as to where the gun had been fired and where the bullet had gone?

A. I couldn't say in what position the gun was fired or where—other than there was blood on the floor. However, there was a bullet hole discovered in the ceiling of the basement.

Q. In the ceiling of the basement?

A. In the areaway above the—where the gun was.

Q. Above where the gun there?

A. There was no ceiling, but there was a rough ceiling there, the joists—the floor joists and the floor from up above.

Q. Was that about directly—where was that in respect to where that blood was on the floor? In

(Testimony of Kenneth C. Pine.)

other words, where was the bullet hole in the ceiling in respect of where the blood was on the floor?

A. I didn't make any accurate observation other than it was in the same general area.

Q. In other words—— A. Above.

Q. Above the spot of blood?

A. Above where the gun was found.

Q. All right. Did you find in the area of the basement any ammunition? [21]

A. Yes, I did.

Q. Where was the ammunition?

A. There is a bookcase marked on the diagram there. I called it "Shelves"—"Shelving" (witness referring to his notes). And on one of the shelves there was a manila paper sack with some *shelves*, cartridges, two different kinds of cartridges that I recall.

Q. And did you determine whether the cartridges that you found on the shelf were live ammunition—they were live? A. Yes.

Q. Did the live ammunition that you found on the shelf fit the gun?

A. The ammunition on the shelf was of a similar nature, size and markings as the spent cartridge in the gun.

Q. All right. Would you step to the board, please, and mark where that live ammunition was that you found which would fit in the gun?

A. It was on one of the shelves of a series of shelves in this particular corner.

Q. All right.

(Testimony of Kenneth C. Pine.)

A. (Witness designating.)

Mr. Clausen: I will mark that, if the court please, P-3.

(Counsel designating P-3 on diagram, Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Clausen): Did you make an examination of the gun [22] as you arrived there at the scene that afternoon to determine what number, if any, of shells were in the gun?

A. No, I didn't.

Q. And with respect to the gun itself, did you find any exploded shell in the gun?

A. No, I didn't. I was there when it was found, but I didn't——

Q. Beg your pardon?

A. I was there when the gun was examined, but I didn't find anything in it myself. I didn't check it.

Q. Oh, you didn't do that yourself?

A. No, sir.

Q. What kind of a gun was that, Mr. Pine?

A. To the best of my knowledge it was a .30 caliber rifle, carbine.

Q. With respect to the body of Mr. Houston, did you see where the bullet had gone in the body and had come out of the body? A. Yes, I did.

Q. And where had the bullet entered the body, what area of the body?

A. In the chest area at the front.

Q. Chest near the heart?

A. Just a moment. (Witness referring to his

(Testimony of Kenneth C. Pine.)

notes.) Somewhere in the chest area. I didn't take any measurement or exact——

Q. In respect of where the bullet came out, where the shell came out of the body, did you find where that was, Mr. Pine? [23]

A. It was in the area of the shoulder blades, to the rear, the bottom of the shoulder blade area.

Q. In the back, is that correct?

A. In the back.

Q. And so therefore if the bullet had gone through the body in that direction, the body would be parallel to the floor in order that the bullet hole would be in the ceiling, is that correct, so far as the spot of blood in the floor is concerned?

A. I couldn't say exactly on that, no. I didn't——

Q. All right. What type of floor was that, Mr. Pine?

A. As I recall, it was a wooden floor.

Q. All right. May I see that diagram that you say—. This was drawn at the time, was it?

Q. On the afternoon when you were there?

A. Yes. (Witness producing and handing counsel.)

Q. Would you tell me, what is the writing on there and what that refers to?

A. The writing down below refers to——

Q. May I first ask you to start——

A. The marks——

Q. May I ask you to start at the top. What is this number over here, Mr. Pine?

(Testimony of Kenneth C. Pine.)

A. That's H78079, which is the police department case file number.

Q. All right. And then immediately below that is the diagram? [24] A. Yes.

Q. The diagram to which you referred, is that correct? A. That's right.

Q. And that indicates the approximate positions of the body and the gun, is that correct?

A. Yes.

Q. Where you have drawn in this upper left-hand corner a little sort of a rectangle and put an X, what does that indicate on your diagram?

A. I drew a rectangle and put an "A" in it and down below the "A" it says "Ammo in paper sack."

Q. In other words, that indicates, does it, where you found the ammunition? A. Right.

Q. All right. Now, on this same sheet of paper, on the page to which we have been referring, there is this figure X-1. Now, "X-1" is what?

A. Well, I have this diagram sectioned off in three sections because—three different levels of the floor. "X-1" the level of the floor is raised approximately fourteen inches from the main level. By that I mean you can stand up straight in the main level, the large section of the room on the south—

Q. In other words—

A. West side.

Q. This section here was raised up how much?

A. Approximately fourteen inches.

(Testimony of Kenneth C. Pine.)

Q. All right. And it was approximately fourteen inches up from this area, was it? A. Yes.

Q. All right. Is that more specifically indicated on your diagram that you are holding in your hand?

A. More specifically indicated?

Q. Yes. You have an "X-1" there.

A. Yes.

Q. Is that what the "X-1" refers to?

A. The "X-1" refers to that.

Q. All right. Now, you have an "X-2." What does that indicate?

A. The section at the northeast of the room was raised higher than fourteen inches. I have approximated it at three and a half feet.

Q. That is this section over here?

A. It is a storage——

Q. Is that correct? A. Yes.

Q. Now, below that figure on your diagram is what, Mr. Pine?

A. Well, I have a "G" to indicate the mark or position of the gun.

Q. All right. Then underneath that?

A. Then the "A." [26]

Q. And then underneath that?

A. Underneath that I made a note regarding the body lying face down, both hands underneath, wound at front breast, and then exit wound. That is as far as that, the exit wound, was apparent. In other words, I knew there was a wound at the front of the breast plus an exit wound at the rear.

(Testimony of Kenneth C. Pine.)

Q. All right. Now, then, on the reverse side of this note that you made at the time is some writing. What does that say, Mr. Pine?

A. When the coroner—deputy coroner arrived, Mr. Osborne, he picked the gun up and examined it and said from the markings on it that it was a 1894 Winchester, caliber .30, WPCP lever action repeater, one cartridge in the chamber. Description of the cartridge in the chamber, which was a spent cartridge, Super X 30-30 Winchester. Yellow metal.

I made a notation, "Yellow metal," as it was colored that, probably brass.

Q. All right. Would you hold those a moment?

Your Honor, this diagram identified by the witness I will offer in evidence as Defendant's 1.

The Court: It will be admitted and marked next in order.

The Clerk: Defendant's Exhibit A marked in evidence.

(Thereupon diagram produced by Mr. Pine, received in evidence and marked Defendant's Exhibit A.)

Mr. Clausen: Q. Have you in your hands [27] or otherwise any notes made at the time, Mr. Pine?

A. Yes.

Q. What are they?

A. Names and addresses, phone numbers of deceased, wife, his mother-in-law, one daughter, the family doctor, the deceased's business occupation, and then the name of another daughter who lived in Berkeley, a married daughter.

(Testimony of Kenneth C. Pine.)

Q. And this information that is set forth on the sheet that you just now handed me, you obtained from whom?

A. From the members of the family, the daughter and Mrs. Houston.

Q. And Mrs. Houston, who is now Mrs. Clayton? A. Right.

Q. All right. And did you have a talk with her —. Well, of course you did. You obtained this information from her? A. Yes.

Q. On that occasion was anything said by you to her or she to you concerning the apparent motive of the suicide, any questions of his action and conduct of late? A. Yes.

Q. All right. Now, who was present when that statement was made, Mr. Pine?

A. What statement?

Q. The statement by Mrs. Houston to you concerning the subject that I just now asked you about. [28]

A. Well, there was much conversation. I don't—I can't say just who was present at any one time. There was quite a bit of conversation.

Q. I understand.

A. Between all of us.

Q. What did Mrs. Houston say to you on that subject, Mr. Pine?

A. I asked Mrs. Houston if her husband had at any time threatened suicide.

Q. Yes. A. And she said no, he hadn't.

(Testimony of Kenneth C. Pine.)

A. And I asked her if he had been planning on doing any shooting or going on a hunting trip.

Q. Yes. A. She said he hadn't.

Q. Yes.

A. I asked her if he had been under any emotional stress or if he had any problem of late that would cause him to do a thing like that, and she said—at the beginning she said that he had at times suffered periods of depression.

Q. Periods of depression at times?

A. Yes.

Q. And what else did she say on that subject, Mr. Pine?

A. She said, however, he was in fine spirits over the past weekend, he had been in good spirits of late except that he [29] was working hard, working long hours getting out some reports which were a yearly function with his—in his business.

Q. Working hard, long hours, getting out reports that were business reports connected with his business, is that correct? A. Yes.

Q. Now, these periods of depression to which she referred, did she state whether those periods of depression occurred coincident with his work in getting out such reports for his business?

A. Well, I just didn't—she didn't elaborate and I just didn't gather what her actual meaning was by “periods of depression.” She said he was under stress at times, like these, when he was preparing these reports.

Q. I see. Do you have any other notes there

(Testimony of Kenneth C. Pine.)

that you made at the time? A. Yes, I have.

Q. Are those all made at the time?

A. Yes.

Q. I see.

A. Merely that Miss Houston said her father came downstairs about two.

Q. Miss Houston, the daughter?

A. I talked to Miss Ann Houston.

Q. All right.

A. Then I have a note here—— [30]

Q. Pardon me just a moment. She stated to you that her father had gone downstairs about two o'clock?

A. Had come downstairs from his bedroom. He had been in bed all morning.

Q. Had been in bed all morning? A. Yes.

Q. And came downstairs about two o'clock, is that correct? A. About two o'clock.

Q. You arrived at the scene what time?

A. It was approximately 2:15.

Q. About 2:15? A. Yes.

Q. What else is set forth in your note that you made at the time, Mr. Pine?

A. The name of the deputy coroner who arrived, took the body.

Q. All right.

A. Plus the ambulance crew.

Q. Did they take the man's body away while you were there?

A. No. The Coroner took the body away while I was there.

(Testimony of Kenneth C. Pine.)

Q. All right.

A. The ambulance did not.

Q. In other words, it was not an ambulance case because the man had already—had died?

A. Dr. Lyman pronounced him dead.

Q. Dr. Lyman—was he the family physician?

A. I gathered he was. He had been called by the family.

Q. What else is on your notes, Mr. Pine?

A. This page refers to March 29th, '54, when the Berkeley Police Department gave the rifle to an attorney for Mrs. Houston. It is merely a receipt for the rifle.

Q. Gave to an attorney for Mrs. Houston what, Mr. Pine? A. The rifle that was used.

Q. The rifle?

A. At the scene of the Coroner's inquest, I turned the rifle over to an attorney named Allison.

Q. All right. Mr. Allison? A. Yes.

Mr. Clausen: I will ask counsel if he has the rifle.

Mr. Angell: Yes, I have the rifle.

Mr. Clausen: Will you produce it, please?

Mr. Angell: I will be very happy to.

Mr. Clausen: All right.

A. That's the extent of the notes.

Mr. Clausen: All right. Thank you, Mr. Pine.

Your Honor, if I may—.

Q. Could you put those in the order in which you had them at the time you handed them to me?

A. There is one other page.

(Testimony of Kenneth C. Pine.)

Q. That has already been introduced in evidence, which is the diagram. [32]

A. Well, that's the way they were.

Mr. Clausen: May I offer these in evidence? I do offer them in evidence and I would suggest that they be considered part of Defendant's Exhibit A and attached to that exhibit.

The Court: They may be admitted and marked as next in order.

Mr. Angell: No objection.

The Clerk: Defendant's Exhibit A, attachments.

(Documents attached to map previously marked Defendant's Exhibit A.)

Mr. Clausen: Q. Were some pictures made at the time, Mr. Pine?

A. Yes. The police photographer took pictures of the body.

Q. And police connected with the same department, the Berkeley Police Department?

A. Yes.

Q. Are those pictures retained in the file of the police department? A. Yes, they are.

Q. And they would be subject to the same procedure that you have indicated for subpoena; in other words, the same officer would have control of those? A. Yes.

Mr. Clausen: You may take the witness. [33]

Cross Examination

Mr. Angell: Q. Is it true that it is the department procedure, Officer Pine, that the Berkeley

The Court: We are going to take a recess.

(Short recess taken.)

Mr. Angell: Before you call Parker, may I ask Officer Pine to remain in the courtroom? I would like to ask permission of the court, counsel asked one question of Officer Pine, which I neglected to answer. I can do it after Inspector Parker is finished.

Mr. Clausen: I suggest you do it now. I was going to ask permission of the court to ask Inspector Pine a question also.

KENNETH C. PINE

recalled as a witness on behalf of the defense; previously sworn.

Redirect Examination

Mr. Clausen: Q. I wanted to be sure I asked you this question, Mr. Pine. At the time the body was found how was Mr. Houston dressed?

A. He had on pajamas and a robe.

Q. Pajamas? [36]

A. Pajamas and a robe and slippers.

Q. Pajamas, robe and slippers? A. Yes.

Q. All right. Now, this diagram that was furnished by plaintiff has indicated here where you put the rifle "Hole cut in floor"—I am pointing to a rectangle. At the time that you observed the premises, was there any hole then cut in the floor?

A. No, that hole hadn't been cut in the floor.

Q. Can you tell me at the point where the rifle was found the approximate height of the ceiling from the floor?

(Testimony of Kenneth C. Pine.)

A. Approximately five and a half feet to the floor joists above.

Q. Can you tell me, Mr. Pine, when you saw the gun was the lever of the gun, the hammer, was that closed down against the shell which had been spent?

A. I didn't examine the gun that closely.

Mr. Clausen: You may take the witness.

Recross Examination

Mr. Angell: Just one question.

Q. Referring again to the bag of shells which you stated you found on the bookcase shelf in the northwest corner of the basement as shown by the red mark P-3. Do you recall whether that bag of shells was open when you found it or was it closed?

A. It was closed. I had opened it to look in. [37]

Q. You had opened it to look in? A. Yes.

Mr. Angell: Thank you.

Mr. Clausen: That is all, Mr. Pine.

(Witness excused.)

EDWIN H. PARKER

recalled as a witness on behalf of the defense; previously sworn.

Direct Examination—(Resumed)

Mr. Clausen: Q. You were one of the officers and you have already been identified.

Mr. Parker, you have given me some rough notes here and I will return these notes to you and ask you if you can tell me this: When you arrived at the

(Testimony of Edwin H. Parker.)

scene did you make an examination of the body and see the wound in the body?

A. I made an examination of the body without moving it at the time I first arrived and after the arrival of the Coroner's deputy, a man named Osborne. The body was turned over and in my presence by him.

Q. The body was turned over? A. Yes.

Q. Yes.

A. I made an examination of the wound at that time and found a rather large opening in the chest area near the midline of the chest. (Indicating.)

Q. Indicating about where? [38]

A. About (witness indicating).

Q. The region of the heart?

A. In the vicinity of the heart. It was a little off to one side of the midline, but it was right in the general area of the heart.

Q. Yes.

A. The opening was rather enlarged, indicating considerable blast, muzzle blast from the gun, and the area around the hole was blackened from powder.

Q. In other words, you are speaking now of the entry hole, which would be in the front chest, is that right?

A. Yes. Both the clothing remaining over the wound and the skin itself showed evidence of blackening from the blast.

Q. Does that indicate that the muzzle of the gun

(Testimony of Edwin H. Parker.)

was on or near the chest at the time the gun was fired?

A. Either pressing against it or extremely close, enough so that it had the same effect as if it were against the body or the clothing.

Q. Now, the wound or the exit wound in the back, that was where, Mr. Parker?

A. It was higher up on one shoulder—well, the bullet hadn't quite gone straight through but a little bit.

Q. Could you indicate on me—show the entry wound—show where the entry wound was, approximately.

A. The entry wound was approximately in this area here [39] (indicating).

Q. Right here?

A. And the exit wound was close to one of the shoulder blades. It may have touched one of the shoulder blades. I don't recall which one it was.

Q. All right. So with that in mind, for the bullet to have gone through the body in this position and come out overhead at the ceiling, the body would have had to be leaning over like this, isn't that correct (demonstrating)?

A. That's correct.

Q. Did you notice any blood at the place where you found the gun?

A. Yes, there was a little blood on the floor at the point where the gun was found and there was also flecks of blood and bits of clothing in the ceiling, around the bullet hole in the ceiling.

(Testimony of Edwin H. Parker.)

Q. In the ceiling. And was that bullet hole approximately overhead from where you found the rifle?

A. Yes, it was approximately overhead, not exactly. I didn't measure the exact distance.

Q. Now, with reference to the rifle, Mr. Angell has it and I have asked that he bring it here. But can you tell me this, is it possible for a man of, say, the height of the deceased in this case, to have put the muzzle of the gun against his front, like this, to have leaned over and to have reached down [40] and pull the trigger?

A. Yes, it would have been possible.

Q. All right. The exit wound that you observed in the back, Mr. Parker, how did that differ from the entry wound that you observed in front?

A. Well, there was no muzzle blast around it.

Q. The exit wound in the back, there was no blast?

A. That is correct.

Q. All right. Now, the gun itself had how many shells in it, or did it have just the one shell that was the cause of death?

A. It had only the one exploded cartridge in it, no others, in the gun.

Q. And the hammer action on the gun, the lever action, was that shut and closed?

A. The lever action was closed and the hammer was down in the discharged position.

Q. In the discharged position. All right. Then overhead where the bullet hole was in the ceiling, did you notice anything around that bullet hole?

(Testimony of Edwin H. Parker.)

A. Yes. There were flecks of blood and little bits of fabric from the clothing.

Q. Did you go upstairs and try to find the spent bullet?

A. No, I didn't. I didn't realize until later that the bullet had gone through the floor. [41]

Q. All right. Can you give me the approximate distance from the floor to the ceiling at the point where the gun was found?

A. I didn't measure it, but it was under six feet, because I had to stoop over. I'm 5-11; I couldn't stand up in the area without bending over.

Q. All right. Now, with reference to the other marks on the diagram here. Officer Pine has put the position of the body when he saw it, in this position, and that is indicated as P-1.

May I explain this diagram. Would you step down here a moment, Mr. Parker?

This indicates the basement section of the home, the Houston home, and it was explained to Mr. Pine as being north in this direction; there are the stairs coming down from the kitchen; there is this basement area which Mr. Pine stated was a little lower than the area here.

Can you tell me where the body was, about, when you saw the body on your arrival?

A. It was in the approximate position as marked by Officer Pine.

Q. P-1, is that correct? A. P-1.

Q. And then with reference to where the gun

(Testimony of Edwin H. Parker.)

was, can you tell me where it was when you saw the gun? [42]

A. In the same approximate position marked by Officer Pine.

Q. The same as Officer Pine.

Then did you find some live ammunition of the area of the gun?

A. No, I didn't see the ammunition.

Q. All right.

You may take the stand, please.

Then, Mr. Parker, when you were there were there some pictures taken by the police department or anyone else?

A. Yes, there were pictures taken by Officer Wylen.

Q. A member of the Berkeley Police Department? A. Yes, he is.

Q. Now, the procedure that you follow normally, Mr. Parker, in connection with—or that you did at the time of the occurrence here in February of last year—what was it? What was that in reference to your official reports?

A. A report is made by the officers involved and then it is referred to the Coroner, and the Coroner's Office in Alameda County arrives at a decision as to verdict either by the Coroner himself or by impanelling a coroner's jury.

Q. Then your report was filed with the police department, was it? A. Yes, it was.

Q. Did the Deputy Coroner arrive while you were there? A. He did. [43]

(Testimony of Edwin H. Parker.)

Q. And that was the gentleman you mentioned as being named Osborne? A. That's right.

Q. Can you tell me who, if anyone, unloaded the rifle in your presence?

A. The Deputy Coroner, Osborne, unloaded it in my presence, and I think Officer Pine was also present at the time.

Q. And you observed what in reference to what was in the gun?

A. I observed there was one exploded cartridge in the chamber and none in the magazine.

Q. Was the man dead on your arrival?

A. Yes, he was dead.

Q. You got there about what time?

A. About two-thirty in the afternoon.

Mr. Clausen: You may take the witness.

Cross Examination

Mr. Angell: Q. Inspector Parker, did I understand you stated as to procedures that you made your report and then you referred it to the Coroner?

A. That's right.

Q. The Coroner would either make a report or finding or call for a coroner's inquest, is that correct? A. That's correct.

Q. And in this case did you make any recommendations with respect to whether there be an inquest or not? [44]

A. Yes, in this case I did request that it be inquested by a coroner's jury rather than without testimony.

(Testimony of Edwin H. Parker.)

Q. Was such an inquest held?

A. There was such an inquest subsequently held by a coroner's jury.

Mr. Angell: I think that is all.

Mr. Clausen: Just one question.

Redirect Examination

Mr. Clausen: Q. Mr. Parker, I don't know whether I asked you, but I will ask you again: You have told us that the powder blade in the front was—. Was the hole in the front larger than the hole in the back of the body?

A. My recollection is that it was larger, but I couldn't be positive about that; but I know that the point of entry was much larger than the caliber of the bullet which had made the hole.

Mr. Clausen: I see. All right. That's all.

Mr. Angell: Thank you.

(Witness excused.)

Mr. Angell: Here's the gun, if you want it.

Mr. Clausen: May I recall the two witnesses to identify the gun, your Honor?

Mr. Angell: We will stipulate that it is the gun.

The Court: Let the record show that there is this stipulation. [45]

Mr. Clausen: Very well, your Honor.

We will offer this (gun) in evidence as Defendant's next in order.

The Court: It will be admitted as next in order.

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Thereupon rifle received and marked in evidence as Defendant's Exhibit B.)

Mr. Clausen: We will call Mr. Wainwright.

As far as the defendants are concerned, your Honor, the officers, Pine and Parker, may be excused temporarily, to be recalled when we get those records from the police department, in the event it is necessary.

The Court: Did you hear that, gentlemen?

You will notify them?

Mr. Clausen: I will get in touch with both gentlemen when we make arrangements for the records.

JAMES H. WAINWRIGHT

called as a witness on behalf of the defense; sworn.

The Court: Your full name, please.

A. James Hamilton Wainwright.

The Court: Where do you live, Mr. Wainwright?

A. Toronto, Canada.

The Court: Your business or your occupation?

A. Assistant secretary and claims officer of The Canada Life [46] Assurance Company.

The Court: What company?

A. Canada Life Assurance Company.

The Court: Take the witness.

Direct Examination

Mr. Clausen: Q. In connection with your duties of assistant secretary, to which you have just referred, for the defendant in this case, can you tell

(Testimony of James H. Wainwright.)

DEFENDANT'S EXHIBIT "C"

The Canada Life Assurance Company, Toronto, Canada, Agrees to Pay subject to the Family Income provision Face Amount Ten Thousand Dollars to the beneficiary on the death of Assured William Mark Houston if death occurs prior to 24th September, 1963 (the Expiry Date).

Beneficiary, subject to the Beneficiary provision: Assured's wife, Charlotte S. Houston.

This agreement to pay and the premiums stated below are subject to the provisions on the attached sheets which, together with this sheet, constitute the policy.

Premiums: \$382.70 payable to the Company yearly in advance from 24th September, 1953 during the life of the assured until premiums have been paid for 10 policy years.

Conversion Option: As hereinafter set forth; available at any time during the conversion period, being the period up to the end of the seventh policy year.

Policy years and anniversaries shall be computed from 24th September, 1953.

Issued at the Company's Head Office at Toronto, Canada, as of 3rd November, 1953.

/s/ E. C. Gill, President

/s/ W. J. Adams, Secretary

/s/ T. R. Price, Assistant Registrar

(Testimony of James H. Wainwright.)

10 Year Term, Convertible within 7 years. Non-Renewable. Assurance payable at death if within 10 years. Premiums payable for 10 years or until prior death. Age 50. Non-Participating. Family Income Provision.

* * * * *

Suicide. During the first two years from the date of issue of this policy, suicide (whether the assured be sane or insane) is a risk not assumed under this policy; should death occur in such manner that the assurance is not effective because of the operation of this provision, the Company will pay an amount equal to the premiums paid under this policy, which amount will be paid in one sum to the person or persons who would have been entitled to the net proceeds of this policy or the first payment therefrom had this policy matured by reason of the assured's death.

* * * * *

Commutation. A beneficiary shall not have the right to commute, or alienate or assign his interest in, any payments of the guaranteed income provided for in this provision unless such right is given to such beneficiary by a writing signed by the assured and deposited with the Company at its Head Office; nevertheless, the executors, administrators or assigns of the assured or the executors or administrators of any beneficiary shall have the right, at any time when they are entitled to receive any payments provided for in this provision, to commute all the remainder of such payments to

(Testimony of James H. Wainwright.)

which they have title. Any such commutation will be made on the basis of interest at $2\frac{1}{2}\%$ per annum, compounded yearly.

* * * * *

Mr. Clausen: Q. Now, with regard to that portion of the application, Mr. Wainwright, part two, which says: "Statement of health—Medical"—

The Court: What page is that?

Mr. Clausen: Question 6. Would you show the court where that is, Mr. Wainwright?

(The witness indicating to court.)

Mr. Clausen: Question 6 is:

"A. To what extent do you use alcoholic stimulants?" And what answer was given to that by Mr. Houston, the applicant in this case, the assured?

A. The answer is given "Yes." And enlarged with the note: "Socially only occasionally."

Q. And Question B: "Have you ever used them to excess?" What did Mr. Houston answer to that?

A. He answered "No."

Q. Is there a subscription to the above answers at the bottom: [49] "The answers recorded above are as given by me and are complete and true"?

A. That is correct.

Q. Is that stated there by Mr. Houston?

A. That is stated there by and signed by the signature of Mr. Houston.

Q. That's the signature that follows, is that correct? A. Yes.

(Testimony of James H. Wainwright.)

Q. Let me ask you, did the company rely upon those statements of Mr. Houston in issuing that policy?

Mr. Angell: Just a minute. May I put in my objection before that is answered?

The Court: You may.

Mr. Angell: Object to it as incompetent, irrelevant and immaterial, not within the issues in the case, calling for the opinion of the witness on something which is clearly not subject to opinion evidence, and is a matter of law for this court to determine from all the evidence that goes in whether it was a material misrepresentation. It is not a proper question to ask this witness if they would have written this if the statements there were untrue. That is for your Honor to determine, whether from all the evidence as is in here whether those were material misrepresentations, and, if so, whether they were such material misrepresentations as to void the policy as fraud, because it is absolutely necessary under [50] the cases in California, and I think there is no question but what this case is governed by California law, that in order to defeat the payment under an insurance policy it is absolutely incumbent upon the insurer not only to show that there were misstatements or misrepresentations but to also show that they were material and that they would have, in the opinion of the court or the jury which passes upon that question and not the witness, as to whether they believe that that

(Testimony of James H. Wainwright.)
policy would have been written had it not been for ——

Mr. Clausen: Your Honor, all that I am asking is the witness's reliance, and the witness is the man that testifies as to the corporation; the corporation can only speak through its agents; and we are merely seeking to show here reliance by the witness upon the application of the applicant.

Mr. Angell: If your Honor please, may I ask a couple of questions before I put in another objection?

The Court: You may.

Mr. Angell: Q. Did you ever see this policy at any time, this application, prior to the date of Mr. Houston's death? A. No.

Mr. Angell: I don't think I need to ask any more questions as to whether they relied upon those representations.

Mr. Clausen: It wouldn't make any difference, your Honor, because the witness has already testified his knowledge of the practices and the knowledge of the company, and the acceptance, [51] rejection, rejection of life insurance risks, his work in the field of underwriting, and so based upon that and the information he has I think I am entitled to ask the question which I did, a very simple one, whether in the whole scope of his knowledge the company for whom he speaks relied upon the application.

Mr. Angell: If your Honor please, I make the further objection, it would be premature. There is

(Testimony of James H. Wainwright.)

no proof at this stage of the game that there is anything that is in there that is stated that isn't true.

Mr. Clausen: All right. If that objection is made, I will withdraw the question at this time and call the witness back. I was only trying to save time, your Honor.

The Court: There is nothing before the court.

Mr. Clausen: That's right.

Q. Now let me ask you this, Mr. Wainwright: Following the death of the assured, did you tender and did the company tender to the plaintiff the unpaid premiums pursuant to the policy in the sum of—the paid premiums in the sum of \$382.70?

A. We did.

Q. And was that tender rejected?

A. It was.

Q. Did you, Mr. Wainwright, for purposes of illustration and in the light of testimony—rather, in light of information derived from the police department, such as Officers Pine and [52] Parker this morning, construct a model in respect of the gun and construct that model in such a fashion as to give allowance to the height of the deceased and to the length of the gun? A. I did.

Q. Do you have the figure there? A. Yes.

Q. And the figure—may I see it, please?

A. (Witness producing a manikin.)

Q. Did you assume in that model, Mr. Wainwright, the known height of the deceased of six feet two and a half inches?

A. Yes. I took the height of this artist's lay

(Testimony of James H. Wainwright.)

figure, as it is called, your Honor, as six feet two and a half inches, recorded height of Mr. Houston. Using that as the scale, I then took a picture, an accurate picture of the gun, and constructed a model rifle, which would be the length of the rifle in this case as known to me, in proper scale to this figure, being the height of Mr. Houston.

Q. And that gun is constructed to that same scale, is it? A. It is.

Q. Now, then, further with reference to the evidence that was available, did you direct the course of the bullet through the chest, established by the postmortem examinations?

A. I did. Taking the information given at the coroner's inquest, I drilled a hole through the chest of this model at the place and in the direction as disclosed by the evidence [53] given at the coroner's inquest.

Q. And based upon the information of powder burns or marks on the clothing and body of the deceased showing the muzzle of the rifle to have been close to the heart area and resting against or immediately near it when discharged, did you reconstruct that rifle position in respect of that model?

A. I reconstructed the rifle position based on the powder burns on the chest, the line of the bullet through the chest and the line of the bullet or the approximate position of the rifle when the bullet discharged.

(Testimony of James H. Wainwright.)

Q. And will you assemble those in that position; you can do it right there, if you will.

A. This, your Honor, is what I constructed——

Q. In reference to the vertical position of the rifle, did you determine that from information such as that given this morning by the police department?

A. I first determined that from the evidence taken at the coroner's inquest, where testimony was given as to how many degrees off vertical the rifle was in two directions.

Q. All right.

A. (Witness demonstrating with scaled manikin and rifle.)

Mr. Clausen: We have that for purposes of illustration, your Honor.

You may take the witness.

Mr. Angell: Are you offering that in evidence or —— [54]

Mr. Clausen: I do. I offer the figure and the rifle in evidence for illustration—purposes of illustration, your Honor.

Mr. Angell: May I ask just one or two questions before you do?

The Court: Yes.

Cross Examination

Mr. Angell: Q. Mr. Wainwright, as I understand it, you have taken the evidence offered by Dr. Kirk and Mr. Bradford on the course of this bullet.

A. That is, what I had available to me.

(Testimony of James H. Wainwright.)

Q. All you have done is take that and with that you physically made this model, is that correct?

A. Well, not with that testimony. That testimony positions the rifle as I have set up there.

Q. You have taken that testimony and you have made physically this manikin here, is that correct?

A. Well——

Q. To illustrate the testimony——

A. I think——

Q. The testimony given at the coroner's inquest.

A. The rifle is made to the scale, and the length of it is accurate to scale, according to this figure.

Q. I see.

If this material is merely being offered in connection [55] with something that you are going to offer, Mr. Clausen, in the form of testimony, in the way of illustration, why, I am not going to raise the objection to it, but if it is going to be offered to prove that that was in fact the——

Mr. Clausen: No, no, this is offered just like a map, for illustration.

Mr. Angell: All right. If it is only for illustration, because I want it perfectly clear no foundation has been laid as to this witness to show that he made any examination of the body, made any examination of the bullet, made any examination of anything other than he went and looked at some testimony at the coroner's inquest, which testimony is not before this court and which is not admissible before this court, and then he has made this little statue and put it up there. Now, if this is merely

(Testimony of James H. Wainwright.)

preliminary to something that is going to be put in here further by you, I don't want to block your case, and you cannot put it in all at once, and I will make no objection to it at this time if it is only by way of illustration, as you say; then I have no objection to it.

The Court: Let it be admitted for that purpose, and limit it for that purpose.

Mr. Clausen: Yes, your Honor.

The Clerk: Defendant's Exhibit D admitted and filed into evidence.

(Manikin and scaled rifle received in evidence for [56] purposes of illustration and marked Defendant's Exhibit D.)

Mr. Clausen: Any further questions, Mr. Angell?

Mr. Angell: I think not.

Mr. Clausen: You may step down, Mr. Wainwright.

(Witness excused.)

Mr. Clausen: Mr. Youngers.

PAUL W. YOUNGERS

called as a witness on behalf of the defense; sworn.

The Court: Your full name, please.

A. Paul W. Youngers.

The Court: Where do you reside, Mr. Youngers?

A. Los Altos.

The Court: Your business or occupation?

A. I am with the New Zealand Insurance Company.

(Testimony of Paul W. Youngers.)

The Court: New Zealand Insurance Company.
Take the witness.

Direct Examination

Mr. Clausen: Q. How long, Mr. Youngers, have you been with the New Zealand Insurance Company?

A. It will be three years this coming January 1st.

Q. Your duties at the present time are what, Mr. Youngers? A. Casualty superintendent.

Q. And that has to do with the litigated claims and the adjustment of claims, does it?

A. Yes. And underwriting and production. [57]

Q. In connection with your work with that concern, did you become acquainted with the deceased in this case, Houston—Mr. Houston?

A. Yes; just about three years ago, right about now.

Q. And what was his position with the firm, Mr. Youngers?

A. He was the United States manager.

Q. And when you say "United States manager," his job encompassed, did it, managing the whole of the United States, with offices here in San Francisco? A. That's right.

Q. And that was for the New Zealand Insurance Company, which is, as the name indicates, located in New Zealand, so far as its home office is concerned? A. That's correct.

(Testimony of Paul W. Youngers.)

Q. How long had Mr. Houston had that job, do you know, at the time he died?

A. Well, I don't know of my own knowledge, but I understand around five, six years.

Q. And do you recall, Mr. Youngers, that the general nature of the work performed by Mr. Houston—do you recall the general nature of that work?

A. Well, he was the manager in all respects.

Q. Were there occasions when you would make field trips with him?

A. I made one field trip with him, yes. [58]

Q. And just to give us a sample of the kind of an individual he was—well, just tell us briefly what happened on that one field trip.

A. Well, let's see—it was three years ago—no, two years ago this Armistice Day that is just coming up. We made a field trip to Oregon, went up through Northern California, up through Klamath Falls, up into Portland, then up into Woodland, Washington. At that point we parted; I went on north to Seattle and he went back to San Francisco.

Q. He called for you, like you testified in the deposition, at six o'clock at the Claremont Hotel in Berkeley?

A. That's correct. I stayed overnight at the Claremont Hotel and he called for me in the morning.

Q. And he drove all that day up to Klamath Falls, Oregon, isn't that right?

(Testimony of Paul W. Youngers.)

The Court: New Zealand Insurance Company.
Take the witness.

Direct Examination

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Q. And he drove all that day up to Klamath Falls, Oregon, isn't that right?

(Testimony of Paul W. Youngers.)

A. We drove up to Klamath Falls, Oregon, got there, oh——

Q. In the afternoon?

A. Two, three in the afternoon.

Q. About two or three o'clock in the afternoon. And in the long series of activities there that you and he engaged in at that time, it was he who wore you out, isn't that right?

A. Well, he was a very vigorous man. I'll put it that way.

Q. All right. Now, do you recall also, shortly before he died, an episode which disturbed Mr. Houston, respecting an accident he had had when he was going over the state line from [59] Oregon into California?

Mr. Angell: Just a minute. May I hear that question read back?

(Question read back by reporter.)

Mr. Angell: I object to the question on the ground that it assumes a fact not in evidence, that there was anything that disturbed Mr. Houston.

The Court: The objection will be sustained. Reframe your question.

Mr. Clausen: Q. Well, isn't it a fact, Mr. Youngers—let me put it this way: Do you recall an episode when Mr. Houston was involved in an accident and telephoned to you?

A. Well, that wasn't an episode. It was an accident that occurred up in southern Oregon some place, yes.

(Testimony of Paul W. Youngers.)

Q. And the accident to which you refer occurred when, Mr. Youngers?

Q. I would say the latter part of October, two years ago.

Q. On that occasion did he not state to you that he was disturbed about the situation?

A. Well, disturbed—he had an accident, yes, and he was unhappy with it and he wanted me to help him do something about it, of course.

Q. It was handled in an unusual fashion, was it not, in that a woman in the car was paid off in cash?

Mr. Angell: Just a minute. Your Honor, I am going to [60] object to these questions as leading. This witness is Mr. Clausen's and I think he can easily ask what was said and what was done without leading the witness or suggesting the answer, and I am going to request that.

The Court: It is leading and suggestive. Reframe your question. Objection sustained.

Mr. Clausen: Q. Mr. Houston, as I understand it, telephoned to you; you were here in San Francisco.

A. That's right.

Q. What did he ask you to do?

A. Well, he——

Q. Concerning the accident, of course.

A. Well, he reported the accident to me; the accident occurred in southern Oregon near Lakeview, Oregon, and he reported to me in the course there were two problems involved, there was a collision damage to his automobile, which was the part

(Testimony of Paul W. Youngers.)

I was to take care of, and I was to report the liability feature of the case to the London Guarantee Company, I think is the name of it, which I did immediately.

Q. Now, with reference to the report given to you by Mr. Houston, did he tell you who were the occupants in the car at the time of the accident?

A. Yes. He had two passengers in the car; one was a gentleman by the name of Irby from Atlanta, Georgia, an agent of the New Zealand Insurance Company, and a young lady was in [61] the car.

Q. Did he tell you where they had been and where he was going at the time the accident happened?

A. Briefly on the phone. I got most of the stuff later. He had been going from Lakeview down to some point in California, but I don't think they ever made it.

Q. In other words, he was going across the state line from southern Oregon into Northern California, is that correct?

A. That is what his intent was, as I understand.

Q. And in this car there was this woman and this man who also worked for the New Zealand Insurance Company?

A. No, he didn't work for me. He was an agent, a general agent.

Q. An agent for them? A. Yes.

Q. All right. Did he tell you who this woman was?

A. He may have. I don't remember.

(Testimony of Paul W. Youngers.)

Q. In his conversation with you concerning the woman and in his conversation with you, how soon after this accident was that?

A. That was the following morning. The accident happened the preceding night. The following morning, yes.

Q. And then what did you do after you talked with Mr. Houston, so far as this woman was concerned?

A. Well, I didn't do anything directly as far as this woman [62] was concerned. I went over and reported the matter to the London Guarantee & Accident Company, and Mr. McNally—and we jointly assigned the investigation to an adjuster at Klamath Falls.

Q. Yes. Then after that was done, after you had assigned it to Klamath Falls, what was done with the woman?

A. The adjuster went over——. Of course I learned this afterwards; I wasn't there. The adjuster went over to Longview—Lakeview—and settled the case.

Q. And did you arrange for her to be paid in cash?

A. I made no arrangements. That was done by the adjuster.

Q. You know that she was paid in cash, do you not? A. I do know that, yes.

Q. And you know she was paid in cash quickly, isn't that correct?

A. I would say quickly, yes.

(Testimony of Paul W. Youngers.)

Q. And would you not say that—I will ask you this question: From your experience and knowledge, as well as your information on this specific case, would it be usual to settle the claim that quickly?

Mr. Angell: Just a minute. I object to this line of questioning now unless the materiality of this be shown in connection with either of the defenses here, your Honor.

Mr. Clausen: I am showing this in connection with motive, your Honor, possible motive in suicide, which courts have [63] permitted a wide latitude. This is one, your Honor, of several motives. One has been explained and testified this morning. I am leading into that too with this witness, your Honor, that the deceased was depressed at this periodic time when these reports were due to the home office, and I am showing this episode of this Oregon incident as another possible motive for suicide—or, I will put it this way, your Honor, a pyramiding effect, pyramiding of trouble and anxiety, or, just as the officer testified——

Mr. Angell: May I state my objection? I have no objection to showing the accident—I have no objection to showing the settlement of the accident, and if any comfort can find its way to the defendant by that, you are entitled to that. I submit, your Honor, that the method of settlement, what conversations were held with this young lady at the time the settlement was made, there is no showing that Mr. Houston was present at that time, that he knew what was said, that he was any party to the

(Testimony of Paul W. Youngers.)

settlement in cash. The evidence is only here by inference that Mr. Houston was insured and that he did what anyone else would do, that he called the insurance company, told them that they had an accident. The witness says that when that information came to him on the morning following the accident, that he went over to the insurance carrier carrying the personal injury and they jointly—the New Zealand apparently was carrying their own insurance, [64] although the evidence does not show that—and that they jointly referred the matter to an adjuster in Oregon. Now they are starting out to show with this witness what occurred up there in Oregon, where the witness was not present, even present, and nothing was heard by this witness except as to the ultimate result. I have no objection to showing they settled the next day or two days or three days, but to go into the incidents occurring up there when neither this witness was present nor was Mr. Houston present, as far as shown by any testimony here before this court, I object to that.

Mr. Clausen: Your Honor, we are trying to show the unusual character of this episode of transporting a woman across a state line, the quick settlement of an unusual character, combined, your Honor, with anxiety, and it is only one step in the case.

May I point out, your Honor, that I certainly cannot prove the entire case in one question and answer obviously.

The Court: The court is prepared to rule. The

(Testimony of Paul W. Youngers.)

objection will be sustained. The foundation has not been laid for the testimony that you suggested.

Mr. Clausen: Q. Now, let me then ask you, Mr. Youngers——

Mr. Angell: Also, your Honor, for the purpose of the record, I wish to make a motion to strike the statement of counsel that this was unusual in transporting a woman over the state line. [65]

The Court: It may go out.

Mr. Clausen: Q. Let me ask you this, Mr. Youngers: Following the telephone call to you from Mr. Houston did you also talk with Mr. Houston concerning the episode and concerning the facts when he got back here?

A. After he returned?

Q. Yes. A. Oh, of course.

Q. That was how soon after?

A. Oh, two or three days, maybe longer, three or four days. I don't remember.

Q. Did you work on the specific claim yourself?

A. No, I never did any of the work on it.

Q. Beg your pardon?

A. I did none of the work on the claim myself.

Q. Isn't it a fact that you communicated with the liability carrier, the carrier that paid this money, this money to this woman?

A. Oh, yes, but I say I didn't handle the adjustment.

Q. Oh, I understand, but you did something. In other words, following your talk with Mr. Houston

(Testimony of Paul W. Youngers.)

you did something, did you not, so far as the liability carrier was concerned?

A. Well, yes, sure I did.

Q. What was that, Mr. Youngers?

A. Well, let's see. Yes, I remember now. In the settlement [66] of the case, as it required raising some money to take care of this release that had been executed, and the adjuster had put up some money, Mr. Houston had put up some money, and that money was reimbursed by the liability carrier to those gentlemen.

Q. That amounted to how much?

A. Around a thousand dollars.

Q. All right. And how quickly was that done, in respect of the accident?

A. You mean the accident itself?

Q. The paying to the woman of cash.

A. Oh, within a matter of, I would say, twenty-four, thirty-six, forty-eight hours.

Q. All right. A. To the best of my memory.

Q. Was there any reason why this method of settling should be made in this case?

A. I wasn't there and I don't know any reason why.

Mr. Angell: Object——. May the answer of the witness be stricken? The witness answered before I had a chance to object, and——

The Court: In any event, he wasn't there and he doesn't know anything about it.

Mr. Clausen: Q. Now, in connection with the same matter, Mr. Youngers, after the accident had

(Testimony of Paul W. Youngers.)

occurred and after the woman had been paid this money and after the settlement had [67] been made, did she sign a release?

A. Well, I never saw it. That wasn't our case. It was another company's, but I assume she signed a release, yes.

Q. Now, following that—in other words, following the payment of money to her—did she then write to the firm and demand more money?

A. Well, to the New Zealand?

Q. Yes. A. Not that I know of.

Q. Did she write to the insurance carrier and demand more money? A. That I don't know.

Q. Isn't it correct that there was information in the office to the effect that she had written in?

A. She had written to Mr. Houston, yes.

Q. And demanded more money, isn't that right?

A. I don't know what was in the letter. I never saw it.

Q. This was after the settlement?

A. Yes, after the settlement.

Q. And what did Mr. Houston say to you was in the letter?

A. He never told me what was in the letter. I never saw it.

Q. What did he tell you about the letter?

A. It was a letter from this young lady.

Q. And when did he tell you about it?

A. Oh, I would say probably thirty days after the accident, [68] thirty, forty days.

Q. What did he say about the letter?

(Testimony of Paul W. Youngers.)

A. Well, he had such a letter and I advised him to turn it over to the other carrier, to his attorney. I had no part in it.

Q. Did he show the letter to you? A. No.

Q. Now, as a matter of fact, Mr. Youngers, your firm, the New Zealand, is subject to periodic visits, is it not, from the home office? A. Oh, surely.

Q. And in this periodic visits from the home office, are there inspections by the people that come from New Zealand?

A. They visit us and go through the business, yes.

Q. I beg your pardon?

A. They visit us periodically, yes, of course.

Q. In connection with the work that Mr. Houston was doing, do you know his habits in respect of taking drinks at noontime?

A. To some extent. I didn't see him very often.

Q. Do you know on the occasions when you did see him drinking at noontime how many drinks he would have and what he would drink?

A. Oh, two or three cocktails I have seen, yes, at noon.

Q. Containing what?

A. Well, alcohol. [69]

Q. Would he drink whiskey?

A. I don't remember, no. I don't remember that detail of it. It would be a cocktail of some kind.

Q. And isn't it correct that you saw him do that on numerous occasions?

A. Not numerous. A half dozen times, I would say. I didn't know him that well.

(Testimony of Paul W. Youngers.)

Q. In other words, your acquaintance with him did not extend to the point of going to lunch with him except more than about half a dozen times?

A. That would be the maximum.

Q. And on the occasions that you did go to lunch with him he would drink in that fashion?

A. Sometimes nothing, maybe one or two or three I would say at the outside.

Q. Then did he ever have occasion, Mr. Youngers—did you ever have occasion to go to dinner with him and drink beforehand?

A. I would say that would be another half a dozen times in the time that I knew him.

Q. On that or those occasions how much would he drink? A. Two or three.

Q. Before dinner? A. Right.

Q. On the occasions that you went to dinner, he would also drink then? [70]

A. Yes, I have already said that.

Q. All right. Now, do you know if Mr. Houston paid more money to this woman who wrote him in this month after?

A. I haven't the slightest idea.

Mr. Clausen: You may take the witness.

Cross Examination

Mr. Angell: Q. Did you ever see Mr. Houston intoxicated. A. I never did.

Q. Did you ever see Mr. Houston in such a condition that he could not do his work for which he was employed? A. I never did.

Mr. Clausen: I object to that as calling for the

(Testimony of Paul W. Youngers.)

conclusion of the witness. In other words——

The Court: It goes to the weight of the testimony. I will allow it.

Mr. Angell: What was the ruling?

The Court: Overruled.

A. I said I never saw him intoxicated, no.

Mr. Angell: Q. Did you ever see Mr. Houston so under the influence of alcohol that in your opinion he was not able to do his work, could not talk intelligently and coherently?

A. I never; no, I never saw such a condition, no.

Mr. Angell: I think that is all.

Mr. Clausen: All right.

(Witness excused.) [71]

Mr. Clausen: Call Mr. Masters.

The Court: We will adjourn until two o'clock.

(Thereupon an adjournment was taken until

2:00 o'clock p.m.) [71-A]

RICHARD B. MASTERS

called as witness on behalf of the defense; sworn.

The Court: Your full name, please?

A. Richard Benfield Masters, 1737 Cedar Street, San Carlos.

The Court: Your business or occupation?

A. Insurance official.

The Court: What is the name of the company?

A. The New Zealand Insurance Company.

The Court: Take the witness.

Direct Examination

Mr. Clausen: Q. Your business or occupation

(Testimony of Richard B. Masters.)

you just informed the court was working for the New Zealand Insurance Company, is that correct?

A. That is partially correct. I think I can enlarge upon that.

Q. Yes, sir.

A. I also work for the South British Insurance Company and the Baloise Marine Insurance Company.

Q. Well, both the British and the Baloise Companies are managed, are they not, by the New Zealand?

A. We act as managers here in the United States.

Q. In other words, your prime employer is the New Zealand Insurance Company? [72]

A. That is correct.

Q. And you have been employed by that company, Mr. Masters, for how long?

A. A little over three years.

Q. During the time up to the point of death of Mr. Houston, was he also employed by that same firm? A. That is correct.

Q. As a matter of fact, during the time that Mr. Houston was employed by the New Zealand Insurance Company did he during that time have the position which you now occupy? A. Yes.

Q. And how long had you known Mr. Houston, Mr. Masters?

A. Just shortly before that; I should say personally not more than two months. Before that I had known him by reputation for some time prior but not personally.

(Testimony of Richard B. Masters.)

Q. When you say two months before——

A. Before I went to work for them. I would say I met him in May of 1952.

Q. All right. How long had Mr. Houston been working for that firm?

A. About six or seven years.

Q. During the period, then, from the time that you went to work for the New Zealand, up to the time of Mr. Houston's death, at least, you continued, did you, working for the New Zealand Insurance Company? [73]

A. Yes, sir.

Q. Now, Mr. Masters, just what were your duties with the New Zealand Insurance Company during the time that you were working for the firm and during the lifetime of Mr. Houston?

A. I had the official position of assistant United States manager.

Q. In other words, assistant to Mr. Houston?

A. That is correct.

Q. In respect of age, were you and Mr. Houston about the same age?

A. Very close to each other.

Q. Therefore, the performance of your own duties—in the performance of your own duties did you more or less review correspondence and accounts and know what Mr. Houston was doing as the manager?

A. Yes.

Q. Your title would be assistant manager, is that correct?

A. Yes.

Q. And the home office is in Auckland, New Zealand, is that right?

A. Correct.

(Testimony of Richard B. Masters.)

Q. Do you recall an occasion in the workings of your firm when a claim was made regarding an accident in which Mr. Houston was involved that happened up in southern Oregon or Northern California? [74]

A. Not officially, I do not.

Q. I beg your pardon?

A. Not officially, never mentioned.

Q. When you say "never mentioned," did you know about it at the time?

A. I was told about it, yes.

Q. And Mr. Houston discussed it with you?

A. Not in the slightest.

Q. I beg your pardon? A. Never.

Q. It came to your knowledge, though, in respect of work that you were doing?

A. That is correct.

Q. Do you recall that no report of that accident was made to your home office?

Mr. Angell: Just a minute. Your Honor, I would object to that question as leading and suggestive.

Mr. Clausen: I will reframe it.

Mr. Angell: I have no objection to him asking whether such a report was made.

Mr. Clausen: I will adopt the suggestion.

Q. Was any report so far as you know made of the happening of that accident to Auckland, New Zealand? A. Yes.

Q. And when was that? [75]

A. I don't have the date at hand, but I know

(Testimony of Richard B. Masters.)

that a letter went down to the general manager informing him that the car had been damaged.

Q. And that was after the happening of the accident?

A. To the best of my knowledge, yes. Yes, it must have been.

Q. Mr. Masters, your deposition was taken in this case, was it not, on July 21st of this year?

A. That's correct.

Q. I refer you to your answer on page 35.

Mr. Angell: The question?

Mr. Clausen: Question on line 24 and the answer on 26.

Mr. Angell: May I ask a question, your Honor? Was that deposition taken by you, Mr. Clausen?

Mr. Clausen: I personally was not there.

Mr. Angell: It was taken by your firm on behalf of your client?

Mr. Clausen: I understand the deposition was taken by all lawyers, and to answer your question directly——

Mr. Angell: The point I am making, if this is an attempt to impeach his own witness—or if it is strictly to refresh his memory, I am not going to complain, but ——

Mr. Clausen: That's exactly what I am doing, your Honor.

Mr. Angell: Well, I don't know what you are going to do, because you are bringing out this transcript; it is a [76] deposition that you took and not one that we took, and I think before the wit-

(Testimony of Richard B. Masters.)

ness is shown this that he ought to be allowed to answer on his own testimony. If it differs, why, I think that we are the ones, your Honor, that have a right to show that difference and not the defendants here who called Mr. Masters as their witness.

Mr. Clausen: Your Honor, what I am doing is refreshing the witness's recollection.

Mr. Angell: It does not appear at this stage that the witness needs his memory refreshed.

Mr. Clausen: I am on the point of doing that, your Honor.

The Court: Ask him the direct question.

Mr. Clausen: Q. Mr. Masters, did you state as follows:

"Q. Was any report, so far as you know, made of the happening of that accident to Auckland?

"A. No."

A. That is correct. When I answered that, that answer was exactly correct, I did not know.

Q. All right. And you state now that the fact is different, is that correct? A. That is correct.

Q. And in what respect is the answer wrong?

A. I was shown a copy of a letter today from our files.

Q. Today you were shown that? [77]

A. Just today, yes, where it showed that this letter had gone down to Auckland mentioning the accident.

Q. What date was that letter?

A. I would have to get the letter to give you the exact date.

(Testimony of Richard B. Masters.)

Q. Do you have the letter with you?

A. I can get hold of it. Have we got it? We don't have it with us. No, I don't have it here.

Q. You did not bring it to court? A. No.

Q. Of whom did you just put that question now, Mr. Masters? A. Miss Hoffman, my secretary.

Q. Also the secretary of Mr. Houston, is that correct? A. Yes.

Q. Will you produce that letter, please, in the morning? A. Yes, I will do that.

Q. Let me ask this question: The Cadillac to which reference was made was a company car, was it not? A. Yes.

Q. By "company car" I mean an automobile belonging to the New Zealand Insurance Company.

A. That's right.

Q. It is a fact, is it not, that Mr. Houston bought a new automobile without asking the company for permission? A. Correct. [78]

Mr. Angell: Just a minute. Your Honor, I object to that question upon the ground that it does not appear as material to any issue in this case.

Mr. Clausen: Oh, yes.

Mr. Angell: I don't know what buying an automobile has to do with the suicide—either suicide or intoxication—and I submit, your Honor, that we are getting so far afield that it is going to take me three or four days to get this out of the record; that is my only reason for trying to keep this record within the issues.

Mr. Clausen: This was fully covered by deposi-

(Testimony of Richard B. Masters.)

Mr. Clausen: This will——

Mr. Angell: May I make an objection?

The Court: Just a minute. What is it?

Mr. Angell: May I make an objection to the form of questions being asked by counsel of their own witness. He refers to a letter and characterizes it as critical and gives [81] names to letters. I submit that is not a proper way to put letters in. Whether they are critical or not is for your Honor to determine. And if they want a letter covering a certain subject, I submit that Mr. Clausen knows the way to get it. We will cooperate in the mere asking for it; you won't need a subpoena duces tecum, as far as anything they need, and I only ask that they be identified and not characterized as—at least until argument—as being critical letters or commendatory letters, or what they are. The documents themselves will speak for themselves.

Mr. Clausen: I have no doubt that that is exactly correct, the letter itself will speak for itself.

Q. Now, Mr. Masters, the letter you just handed me is dated February 5th, 1954, and it is marked as received in the office here of the company on February 15th, 1954, or just one week before the death of Mr. Houston, isn't that correct?

A. You have the document there. I don't have it here.

Q. Mr. Masters, this other letter to which you just referred as having been sent from the home office, did you bring that along with you also?

(Testimony of Richard B. Masters.)

A. I only saw that letter once. I have no idea where it is, if it is still in existence.

Q. Will you look for that, please, and produce that in the morning?

A. If I can, but I doubt that I can. [82]

Q. With regard to the letter that you just handed me, you produced it from your pocket, let me ask you, do you have any other letters or correspondence of a similar character in your pocket?

A. No.

Q. Did you have any special reason why you brought this to court?

A. I was asked to bring it up by your assistant, your son.

Q. My son, is that correct? A. Yes.

Q. And he asked you also to search for some other letters, did he? A. I don't believe so.

Q. I will come to those at the proper time.

Now, Mr. Masters, I will ask you, according to the operating practice of your firm, was it not a fact that the purchase of a new automobile should have been submitted to the company home office?

Mr. Angell: Objected to as incompetent, irrelevant, immaterial.

Mr. Clausen: He would know, your Honor.

Mr. Angell: Incompetent, irrelevant and immaterial to any issue in this case.

Mr. Clausen: He is the manager.

The Court: If he knows, he may answer. [83]
Objection overruled.

(Testimony of Richard B. Masters.)

A. It was customary to refer the purchases to the home office first, yes.

Mr. Clausen: Q. As a matter of routine and practice, therefore, you are familiar with the fact, as general manager, that the question of the purchase of an automobile for the United States manager, which was the office occupied by Mr. Houston, would be a matter that would be submitted to the home office for their approval? A. Yes.

Q. And Mr. Houston did not do that in this case, did he?

A. Not prior to the purchase, no.

Q. And the automobile which was damaged was damaged in the accident which occurred in the northern part of California or the southern part of Oregon, is that correct? A. It is correct.

Q. And when did that accident happen, about?

A. I do not recall. I should say, the latter part of 1954.

Mr. Angell: '53? A. '53.

Mr. Clausen: Your Honor, we will ask that the letter which—. First, I will lay a foundation, if I may.

Q. The letter, Mr. Masters, that you produced from your pocket this afternoon is apparently signed by someone at the bottom as "General Manager." What name is that? [84]

A. O'Brien—W. J. O'Brien.

Q. All right. And what office did he occupy in the New Zealand Insurance Company at the time? The letter is dated February 5th, 1954.

(Testimony of Richard B. Masters.)

A. May I see the letter again?

Q. Yes. (Handing witness.)

A. (Examining document.) He was the general manager.

Q. And by "general manager," Mr. Masters, do you mean the over-all world general manager?

A. That is correct.

Q. So his jurisdiction extended to the United States and any offices throughout the world, is that correct?

A. That is correct.

Q. This being a British company, is that correct?

A. New Zealand.

Q. New Zealand, rather.

We will ask, your Honor, that the letter be marked for identification. I haven't had a chance to read it.

The Court: It will be marked for purposes of identification.

(Letter dated February 5, 1954, New Zealand Insurance Company to San Francisco office, marked for identification Defendant's Exhibit E.)

Mr. Angell: I submit, the letter be given to your Honor to read and then we will make our objection. [85]

The Court: He suggests that you read it.

Mr. Angell: I would suggest that your Honor read it so that we can make our objection and your Honor rule on it.

The Court: I suggest that you read it.

Mr. Clausen: Yes.

(Testimony of Richard B. Masters.)

Q. Can you tell me what portion of this relates to the matter that I have been asking about?

It is a long letter, your Honor.

(Witness examining Exhibit E for identification.)

Mr. Angell: The first paragraph.

The Witness: It is the first paragraph.

Mr. Clausen: (Reading.)

“Company Motor Cars (Subject File)

“1831: I note the purchase of the ‘Cadillac’ car at a cost of \$6,219 in lieu of The Branch Car No. 37, for which a recovery was made under Insurance Policy of \$3,983. I am aware of the circumstances which necessitated the replacement of your car and would have appreciated the opportunity of considering this matter before the new purchase was actually completed. I understand from your remarks in your letter No. 1838 that all future purchases of cars will be referred to head office.”

Q. Now, this letter 1838, Mr. Masters, was that a letter from Mr. Houston? A. Yes.

Q. To the New Zealand? [86]

A. I believe so, yes.

Q. Will you bring that in the morning also?

A. I believe that is the one that you have asked me to bring.

Mr. Angell: Are you offering that letter in evidence?

Mr. Clausen: I am going to study the letter through before I offer it in evidence.

Q. Have you, Mr. Masters, had occasions in the

(Testimony of Richard B. Masters.)

past, during the lifetime of Mr. Houston, to be present when he was eating lunch and dinner, and so forth? A. Yes.

Q. Have you had occasion during that same period of time to be with him on so-called field trips? A. No.

Q. Well, is it your knowledge that he customarily did make field trips as United States manager? A. Occasionally, yes.

Q. When you state "occasionally," how often would he be out of the office for that purpose?

A. I would say four times a year.

Q. And during those periods how long would he be gone?

A. It might be anywhere from the week or two, three weeks.

Q. Do you recall other occasions when you have been with him on luncheon occasions? How often you have had lunch with him?

A. I would say it would vary, but on an average of once every two weeks. [87]

Q. And on those occasions would he take drinks before lunch? A. Yes.

Q. And would he on those occasions drink whisky? A. Yes.

Q. And would he on those occasions drink up to four drinks?

A. That would be a very rare occasion.

Q. Would he on occasion drink up to four drinks?

(Testimony of Richard B. Masters.)

Mr. Angell: Submit it has been asked and answered. A. On occasion, yes.

The Court: It has been answered.

Mr. Clausen: The witness just said now "on occasion, yes."

Q. And how often, Mr. Masters, would Mr. Houston drink up to four drinks before lunch?

A. I would say—you ask for a figure—once every four times that we were out, once a year possibly he would have up to that number of drinks.

Q. On the occasions when you were out with him? A. Yes.

Q. On the occasions when you had dinner with him did you have drinks before dinner?

A. Yes.

Q. And on those occasions how much would Mr. Houston drink?

A. Oh, he might have two drinks, three drinks.

Q. Would he on occasion have more than three?

A. Very seldom.

Q. Now, on these occasions, Mr. Masters, of the field trips, do you recall any occasion at all when you were present when he was with field men?

A. Yes.

Q. And when was that, Mr. Masters?

A. We had a so-called field meeting at—it's a term that we use in our business—a field meeting at his cabin up in Oregon.

Q. And when was that?

A. I would say around in April of '53—somewhere in that time.

(Testimony of Richard B. Masters.)

Q. And when you say "a field meeting," this was in a place in Oregon known as what? What was the name of it?

A. Near Lake Field (sic).

Q. Near Lakeview, Oregon. For the purposes of this I will call it Lakeview.

When this meeting was called at Lakeview, who was present as so-called field men?

A. Our sales representatives who are in each state and supervise each state were called in, one or two states were called in for that.

Q. And about how many, about, were present, Mr. Masters?

A. I would say around fifteen to twenty.

Q. And during that time was there any drinking done? [89]

A. Yes.

Q. And during what part of the day?

A. In the evenings.

Q. And lunch time?

A. I don't recall seeing any at lunch.

Q. And what form of intoxicating liquors were consumed?

A. Whisky.

Q. Whisky. And on those occasions did you see Mr. Houston drink?

A. On only one occasion did I see him drink.

Q. And during that time did the other men drink?

A. Yes.

Q. Were the meetings held throughout several days?

A. Yes.

Q. Now, the home office—and when I say "home office" I refer to the New Zealand office at Auck-

(Testimony of Richard B. Masters.)

land—that office, from your own knowledge as manager and formerly assistant manager, were interested, were they not, in the outside activities of its employees?

Mr. Angell: Objected to as incompetent, irrelevant and immaterial and not related to any issue in this case, as to what the home office thought about outside activities. It is no part of this case at all, your Honor.

Mr. Clausen: Your Honor, again I am back to what I stated before, your Honor, that it is just impossible to prove [90] the entire case or any aspect of the case in one question. This, your Honor, is preliminary to other questions of similar character and import, having to do with what I have termed here the reaction of the home office to some of the conduct which had been going on.

Mr. Angell: It is not shown, your Honor, that this witness knows what the home office thought.

Mr. Clausen: I will ask him that question.

Mr. Angell: He is not the home office.

Mr. Clausen: May I withdraw the question, your Honor?

The Court: Yes.

Mr. Clausen: Q. Mr. Masters, from your experience as assistant manager, assistant United States manager, while employed in that position during the time that Mr. Houston was United States manager do you know whether the home office of the firm was interested in the outside activities of its employees? A. I do not know.

(Testimony of Richard B. Masters.)

Q. I beg your pardon? A. I do not know.

Q. Now, Mr. Masters, I will refer you to your deposition, page 45, and ask you whether this refreshes your recollection——

Mr. Angell: Just a moment. May I make an objection?

Mr. Clausen: Page 45, lines 6 to 13.

Mr. Angell: This is the most amazing procedure I have ever seen, your Honor, in some thirty-three years at the bar, [91] counsel taking a witness, making that witness his own, taking the deposition, reducing the testimony to writing, having the deposition in court and then proceeding to ask the questions directly of that witness, that deposition which is unusable, since he brought it here, except for one purpose and that is impeachment and that is by me, and now the counsel is endeavoring to call Mr. Masters as his own witness. Counsel is the one who took that deposition and he produces Mr. Masters here. He is bound by his testimony. Now, he is attempting to impeach him. He has not pleaded surprise in answer to any question and asked relief of this court to be relieved from surprise on any material question in this case, and I submit until he does it is improper direct examination and I object to it.

Mr. Clausen: The pending question, your Honor, before the court is whether the quoted part of the deposition refreshes his recollection. If the witness says no, then I am going to appeal to the court on another ground. I am, your Honor, interested

(Testimony of Richard B. Masters.)

in developing the truth and it would seem to me that the position of Mr. Masters in respect of the manager of the firm, which was formerly occupied by Mr. Houston, is rather self-evident. I am getting the facts and I am getting the facts in the manner that I can.

The Court: The objection will have to be sustained.

Mr. Clausen: Now, your Honor, I claim surprise in that—and I offer to prove that this witness who now occupies the [92] position that Mr. Houston did on this occasion state directly contrary to his present testimony in respect of the question that I ask as to the company practice.

The Court: I am going to allow it, subject to your motion to strike, over your objection, so that you don't waive any of your rights.

Mr. Clausen: Q. I will ask you, Mr. Masters, if you gave this testimony on this occasion—"By Mr. Mannon"—this was not a question put by myself but by Mr. Mannon who represented a different defendant:

"Mr. Mannon: Q. Mr. Masters, did the New Zealand people in Auckland pay any attention to the outside activities of the personnel in the city here?

"A. They were interested in them.

"Q. If Mr. Houston's name had been mentioned or linked with that of a prostitute, would it have affected, possibly, his situation with the company here?

(Testimony of Richard B. Masters.)

“A. I would say that it might have.”

Did you give that testimony in respect to those questions? A. I did.

Mr. Angell: I make my objection and my motion to strike now, your Honor.

The Court: No. We will make up the record.

Mr. Angell: What page, Mr. Reporter?

The Reporter: Designate this as Note 1. [93]

Mr. Angell: Thank you.

Mr. Clausen: Q. Mr. Masters, did you obtain knowledge during the time you were employed by this firm in connection with the accident in which this Cadillac was damaged, that Mr. Houston was driving, with a woman and a man? A. Yes.

Q. And did you obtain knowledge that a settlement was made with this woman by the payment to her of cash? A. Yes.

Q. And did you obtain knowledge, as testified this morning by Mr. Youngers, that after the settlement this same woman made a written demand upon Mr. Houston? A. No.

Q. I beg your pardon?

A. I did not obtain that knowledge.

Q. Mr. Houston never told you anything about that?

A. Mr. Houston never told me anything about it.

Q. Would you cause in that regard a search to be made of the files and employ the assistance of Miss Hoffman, who you said was the secretary, for such a letter, which according to Mr. Youngers

(Testimony of Richard B. Masters.)

came in about a month after the settlement, thirty or forty days I believe he testified.

Do you have, Mr. Masters, in your company files here any copy of the settlement papers made with this woman? A. I don't know. [94]

Q. Will you search for that, and, if found, bring them in the morning also?

A. If they can be found.

Q. I believe reference was made in my questioning earlier this afternoon to another letter which came from the home office to Mr. Houston and which I termed a critical letter—but, in any event, putting that to one side—had to do with a suggestion that Mr. Houston made in respect of appointment or election on the board of directors. Will you tell me, Mr. Masters, the approximate date of that letter?

A. Approximately the end of 1953.

Q. And will you search for that letter and the copy of the reply, if any? A. Yes.

Q. For tomorrow morning.

Now, when Mr. Houston received either one of these two letters, which for my purposes I have called "critical letters file," the one involving the purchase of the automobile or the one involving his suggestion as to the board of directors, did Mr. Houston discuss either one of those with you?

A. Only the second one.

Q. The one involving the purchase of the automobile? A. Yes.

Q. Is that correct? A. Yes. [95]

(Testimony of Richard B. Masters.)

Q. Now, when that occurred did he show the letter to you?

A. No, I don't recall his showing it to me.

Q. Did you observe his demeanor when he spoke with you about it? A. Yes.

Q. Did he appear to you to be upset?

A. Not particularly. A little concerned, I would put the word.

Q. I will refer to your testimony on page 37, lines 13 to 14, Mr. Masters.

Mr. Angell: Same objection, your Honor, as made before.

The Court: Same ruling. I will allow it subject to your motion to strike, over your objection.

Mr. Angell: What page, Mr. Reporter?

The Reporter: This will be designated as Note 2.

(Witness examining deposition.)

Q. (By Mr. Clausen): Page 37, lines 12 to 15:

"Q. Do you know if Mr. Houston answered that letter?

"A. I don't know definitely, no.

"Q. Did he seem upset about it? "A. Yes."

Did you give that testimony? A. Yes.

Q. Now, were the two letters to which I have just referred both signed by this over-all general manager of the world? [96] A. No.

Q. And what letter was not signed by him?

A. The first letter.

Q. And who signed that?

A. I believe it was the then chairman of the board, Mr. Rhodes.

(Testimony of Richard B. Masters.)

Q. Then chairman of the board of the over-all company board of directors? A. Yes.

Q. Was it a practice, Mr. Masters, for your United States operations to be reduced to the form of a report in the early part of each year, which report would be passed through your company auditors and then channeled down to Auckland, New Zealand, to the home office? A. Yes.

Q. And was that report in the process of separation, last year, 1954, at the time of the death of Mr. Houston?

A. It had been completed prior to that time.

Q. And in that report, is it correct that certain revision was made by Mr. Houston? A. Yes.

Q. In some of the figures? A. Yes.

Q. And in that revision, being ordered by Mr. Houston, did it necessitate doing some of the pages over? [97] A. Yes.

Q. And was that in the form of an annual report required by law? A. Yes.

Q. Required by the State of California?

A. By all states.

Q. And this had to do with the amount of business done by the companies, the earnings of commissions and what money would be passed on to the home office and what would be credited here to the United States office? A. That's right.

Q. Now, under the revision that Mr. Houston ordered, the home office would get less money, isn't that correct? A. No.

Q. I beg your pardon?

(Testimony of Richard B. Masters.)

A. They would get more money.

Q. They would get more money, you say?

A. Yes.

Q. Is it not correct that the commissions ordered by Mr. Houston would result in less money for the home office and more money for the United States office?

A. Eventually the home office would make more money out of it. Our profits go to the home office eventually.

Q. Well, is it not correct, Mr. Masters, that some of the figures which required revision had to do with relative [98] commissions paid between two other companies and the New Zealand?

A. That is correct.

Q. And was there not a figure of \$35,000 involved in this revision?

A. I don't recall the figure.

Q. And it had to do, had it not, with the fact that the commissions which had been credited to these two other companies that you referred to this afternoon would not receive this \$35,000 but rather the \$35,000 would be credited to the San Francisco—or, rather, to the United States operations of the New Zealand?

A. That is correct.

Q. And that report was then signed by Mr. Houston?

A. Yes.

Q. And sent in, is that right?

A. Yes.

Q. Now, you stated that you were of the same age as Mr. Houston. How old was he when he passed away?

(Testimony of Richard B. Masters.)

A. I would say 49. I am not sure of that.

Q. And how old were you then?

A. Let's see—that was in '54. I was 48.

Q. 48. The fact of the matter is that you had been employed by the New Zealand then for a period of about two years?

A. About—yes, then about two years. [99]

Q. And when you were employed by the New Zealand it was with the definite idea that you were to take over the job of Mr. Houston, isn't that right?

A. That was never stated at any time.

Q. Would you read your testimony on page 12, please?

Mr. Angell: Same objection, your Honor.

The Court: Same ruling.

Mr. Angell: Call to your Honor's attention too that at the taking of this deposition there were the usual stipulations, that all objections to the answers to any questions were reserved to the time of trial, except as to the form of the question.

The Court: The record shows your objection to this line of testimony. I will allow it to go in subject to the motion to strike.

Mr. Angell: What page, Mr. Reporter?

The Reporter: Note 3.

Q. (By Mr. Clausen): I will ask you to read from the bottom of the page, page 11, because the answer goes over to the top of page 12.

A. (Witness examining.)

Q. Line 23, page 11.

“Q. You spoke of learning the duties of the

(Testimony of Richard B. Masters.)

United States manager right from the start. Did you contemplate from the start that you might be made the United States manager?

"A. Yes, I did. Actually, when I first came with them [100] I did not realize that Mr. Houston and I were so close in age. I was definitely employed with the idea that *same* day I would become the United States manager."

Did you give that testimony?

A. Your Honor——

Mr. Angell: Read all the next three or four questions.

A. Would you read a little further than that?

Mr. Clausen: I will be glad to.

"Q. Mr. Houston told you that, did he?

"A. Never in those words, no.

"Q. That is just because the man who is the assistant manager or deputy usually works up to being manager; is that correct?

"A. Yes. My training was along those lines, in other words.

"Q. Did you anticipate, when you went to work with Mr. Houston, that he would cease to be the United States manager at any particular time? As far as you knew, it might be when he was 65, or some such age?

"A. Yes, I actually felt that we would probably end up about the same, because our ages were very close."

Did you give that testimony? A. I did.

Mr. Clausen: That is all, Mr. Masters. [101]

(Testimony of Richard B. Masters.)

Cross Examination

Q. (By Mr. Angell): The question you were asked before, that was read to you, was when you were told by anyone in the company that you would work up into Mr. Houston's position. My recollection is that you said no.

Mr. Clausen: Object to that, your Honor. Whatever was—well, whatever the other question was would be right there.

The Court: Let the record speak for itself. Proceed.

Q. (By Mr. Angell): That is your recollection of your testimony?

Mr. Clausen: Object to that, on that ground, that the record speaks for itself.

Mr. Angell: It is cross-examination.

The Court: Overruled. He may answer.

A. Are you now asking the question?

Q. (By Mr. Angell): You get the question that I am asking?

A. If you would repeat it again, please.

Mr. Angell: Mr. Reporter, would you read it?

(Pending question read back by reporter.)

A. I was never informed that I would become manager.

Q. (By Mr. Angell): You hoped and felt, like anybody that goes to work, that good fortune smiles on you, if you work hard, you will get to manager, and you were fitted by education and experience for that job, is that correct?

A. That's correct. [102]

(Testimony of Richard B. Masters.)

Mr. Clausen: Just a moment. We will object to that, your Honor, as being compound, calling for the conclusion of the witness, what he felt——

The Court: Let the question and the answer stand. Objection overruled.

Q. (By Mr. Angell): Mr. Masters, as a matter of fact, Mr. Houston very shortly before his death was offered a position as president of the Fire Association of Philadelphia, was he not?

A. He so informed me, yes.

Mr. Clausen: Object to that, your Honor, as being hearsay and certainly not within the scope of the examination that I have conducted of this witness.

Mr. Angell: I am on cross-examination, your Honor, and I am entitled to go into these subjects. You insisted on bringing them in and I am not bound to stay where you opened up these subjects; I can go into them fully, and that is the relationship of this man with his company and his business affairs.

Mr. Clausen: If the court please, what he is doing is asking this witness what some other company may have offered Mr. Houston at the time Mr. Houston died.

The Court: If he knows, he may answer.

Mr. Angell: It shows the state of mind of Mr. Houston, whether it was true or not. [103]

A. Mr. Houston so informed me, yes.

Mr. Clausen: Ask the answer be stricken.

Q. (By Mr. Angell): At that time did Mr.

(Testimony of Richard B. Masters.)

Houston state to you whether he intended to take that job or not?

A. He said he had declined it.

Q. Did he make any comment as to whether he intended to remain with the New Zealand Company?

A. He said he declined because he had promised the board to remain with the New Zealand Insurance Company.

Q. Do you know of any occasion of your own knowledge, from anything you heard or saw, of Mr. Houston ever being asked to leave the New Zealand Insurance Company? A. No.

Q. Was Mr. Houston as far as you know highly regarded by the management of the New Zealand Company?

Mr. Clausen: Object to that as being hearsay and certainly calling for the conclusion of this witness as to what the company may have thought.

The Court: You will have an opportunity to develop the situation if it is otherwise. The objection will be overruled.

A. I have lost track of your question.

Mr. Angell: Strike it.

Q. Mr. Masters, do you have any knowledge by either having anyone in the management of the New Zealand having spoken to you prior to Mr. Houston's death or having seen any correspondence, [104] do you have any knowledge as to whether Mr. Houston was regarded highly and favorably by anyone in the management, the board of directors or any of

(Testimony of Richard B. Masters.)

the officerships of the New Zealand Insurance Company?

Mr. Clausen: To which we make, your Honor, the same objection as before, to the similar question.

The Court: Let the record show the objection will be overruled.

A. I have never heard any comment made which was other than favorable toward Mr. Houston.

Q. (By Mr. Angell): You were asked some questions about Mr. Houston's drinking, on direct, and have you answered substantially all you know or about which you saw as to Mr. Houston's drinking? A. Yes.

Q. And, Mr. Masters, have you ever seen Mr. Houston at any time during your association with him, either socially or in business, where Mr. Houston was intoxicated?

A. "Intoxication" is a relative term. I have never seen him drunk, never seen him to the point where he had lost his ability to handle himself.

Q. Did he always in your presence, or anything that you know of, conduct himself as a gentleman?

A. Yes.

Q. And with proper demeanor?

A. Yes. [105]

Q. Was he highly regarded by his employees who were in and about the place there where you worked?

A. Yes.

Q. Was he on the job regularly?

A. Yes. He was beginning to spend more time at his ranch, with his ranch properties, trying to get a

(Testimony of Richard B. Masters.)

little more rest from his duties. Other than that he was here.

Q. You were asked about this annual report, Mr. Masters. Now, will you just tell the court, simply, what this annual report was?

A. Each year we prepare for the states, for each state, an annual statement. It is made up on a form which has been adopted to make the form adaptable to all states. And we prepare it. It is anticipated and so our accounting department diaries the information and sets it up so that we are ready to have it submitted for printing in sufficient time that it can be signed, reviewed and signed by the chief executive and forwarded to the states. It is a report on our activities throughout the year, the financial aspect.

Q. Is it true or untrue that that report that Mr. Houston got then, and you got up, now is a report required by state law wherever your company does business?

A. That is true.

Q. To be filed annually, and that they require likewise in New Zealand, the head office of the company? [106]

A. Yes, we send it down as a point of information to them.

Q. Now, will you just tell the court how that report is made up. Is that report pretty much—does it pretty much have to comply with a specific form required like, say, to the State of California and the various states for insurance companies to file their statements on?

(Testimony of Richard B. Masters.)

A. Yes, it is a standard form.

Q. It is a standard form. Now, then, that form or statement is in several parts, is it not? A. Yes.

Q. One of the parts is a financial part, is it not?

A. That is true.

Q. As to the financial part, who in New Zealand organization would have been the parties getting up the financial report at the time just prior to Mr. Houston's death?

A. The comptroller and his assistants.

Q. Would Mr. Houston have anything to do with that report, whatsoever, as far as those financial figures were concerned?

A. Very little. They might confer with him on some point or some—. All I am speaking now is from my own personal experience this year.

Q. Now, then, as to the part of the report which Mr. Houston would have had something to do with, what would be that part of the report that Mr. Houston would have to get up as manager?

A. Well, it's very little that he himself would draw up as [107] manager. He would review the whole report. But as manager, there is very little he would have to do with it.

Q. He would review it, to see if it added up and be in correct form, would he not?

A. Not add it up. But if it were in the correct form and—after all, since he has to sign it, he would want to.

Q. He becomes familiar with it.

A. That's correct.

(Testimony of Richard B. Masters.)

Q. Was it possible, as has been inferred here, from the questioning, that in any way Mr. Houston could have jockeyed that report, either to his advantage or against it? A. Well, Mr.—.

Mr. Clausen: Object to that——

Mr. Angell: Just a moment——

Mr. Clausen: ——as calling for the conclusion of the witness. He asked the witness was it possible for something to have been done.

Mr. Angell: Well, rather a nasty inference has been made in this court, your Honor, against Mr. Houston.

Mr. Clausen: Pardon me, Mr. Angell——

Mr. Angell: I am going to erase it, if I can.

Mr. Clausen: I was stating to the court, your Honor, that when he asked the witness if something is possible, clearly calls for the conclusion of the witness, and we object on that ground. [108]

Mr. Angell: I think this witness, if he knows, can answer that question.

The Court: The objection will be overruled. He may answer.

A. Mr. Houston, as the manager for three companies, with sole authority in the United States for them, was in a position to do what he considered was proper in arranging the statement.

Q. (By Mr. Angell): Was that purely as to the physical setup or arrangements?

A. It would be purely the inter-company details, because otherwise it is all set up in form; there is nothing——

(Testimony of Richard B. Masters.)

Q. Now, as to the financial matters, the comptroller, as I understood it, took care of it not only for New Zealand but for the other two, is that correct?

A. Yes.

Q. Mr. Houston was not a comptroller?

A. That is correct.

Q. He was not a financial man?

A. Well, he had an exceptional brain for figures; he could do things with figures or, at least, he could think beyond——

Q. His looking over that report would be to see that it would be in proper shape to be filed as to be required by law, is that true?

A. That's correct.

Q. And do you know of anything in that report that was not [109] in exactly in accordance with law and good practice?

A. No.

Q. Did you ever hear within your company or from the state or anybody with which that report was filed that anything was wrong with that report?

A. No.

Q. Did you ever hear Mr. Houston at any time ever say that he was depressed or worried or disturbed about filing that report?

A. The only thing that he said about that report was that it was too bad the comptroller didn't find out this particular matter which he wanted adjusted.

Q. Now, what was this matter that Mr. Houston wanted adjusted?

A. We have three companies, two of which operate through general agents. General agents are paid a

(Testimony of Richard B. Masters.)

higher commission than our local agents. The New Zealand operates through our local agents and a few general agents. The other two companies operate through general agents. The business which the New Zealand Insurance Company reinsures or cedes off to the other two companies was—the commission on that business was paid to the New Zealand on the local agency basis. The business which the other two companies reinsured with the New Zealand, the commission that was deducted was on a general agency basis. Therefore, the other two companies were making about 10 per cent higher, and Mr. Houston simply wanted to equalize this between [110] the companies.

Q. Was that within his power to do, accordingly? A. Absolutely.

Q. That was one of his jobs, to do that, was it not? A. Yes.

Q. He was supposed to do it? A. He was.

Q. And was that accepted so far as you know by both the other companies?

A. There was never any question.

Q. And do you do the same thing now?

A. I would if the occasion arose.

Q. And you have the authority to do it?

A. I have.

Q. And I think you testified that there was never any question concerning that report, no question had ever been raised, either by Mr. Houston or anyone in authority or the company?

A. That is correct.

(Testimony of Richard B. Masters.)

Q. Is it not true that every year that statement, that report, has to be filed, not only by the New Zealand but by all insurance companies?

A. That is true.

Q. Is it not true that for all the years that Mr. Houston was there, that he would have been at least while you were there, [111] that he filed those reports, did he not? A. He did.

Q. Much has been said about this Cadillac automobile accident in Oregon that occurred sometime in November, I believe, 1953, and you testified somewhat on it. I think you testified that you knew very little about it, is that correct? A. That is correct.

Q. And since you heard hearsay or scuttlebutt around the office? A. Yes.

Q. And did you observe at or about the time of that accident in Mr. Houston, that he paid any particular attention or anything unusual or any different from what any other person would do if they had an automobile accident?

A. I didn't observe anything unusual in his behavior—demeanor.

Q. Just comment; it was settled up; as far as you knew that was the end of it?

A. He never mentioned the subject to me.

Mr. Angell: I think that is all.

Redirect Examination

Q. (By Mr. Clausen): Mr. Masters, before you were employed by the New Zealand Insurance Com-

(Testimony of Richard B. Masters.)

pany you had a talk, had you not, with one of the men from the home office? A. Yes. [112]

Q. What was his name?

A. Sir James Gunson.

Q. When you stated, as you stated on page 12, "I was definitely employed with the idea that some day I would become the United States manager," was that impression gained by you after you talked with this Sir James Gunson?

A. Sir James never gave me that statement. I might have the idea as my personal thought, but it was never stated by Sir James at any time.

Q. When you gave your testimony here, on page 12, Mr. Masters, and you stated: "I was definitely employed with the idea that some day I would become the United States manager"—

The Court: There is nothing unusual about that.

Q. (By Mr. Clausen): I say, when you made that statement on your deposition, Mr. Masters, was that impression gained by you after you had talked to this Sir James Gunson?

A. No, it was my idea that I would want to be manager at some time.

Q. And with whom did you discuss your employment, in addition to talking it over with Sir James Gunson? A. And Mr. Houston.

Q. And, let me ask you this, with regard to Mr. Houston and this annual report, you said he stated to you, "It was too bad the comptroller did not find out this allocation was incorrect"?

A. Yes. [113]

(Testimony of Richard B. Masters.)

Q. And as a result of not finding out, was it not correct that the report had to be reprinted and pages pasted over other pages? A. That is correct.

Q. By the way, did you go to Lakeview, Oregon, on more than one occasion? A. Yes.

Q. How often, Mr. Masters?

A. On one other occasion.

Q. When was that?

A. I took my family up for a vacation, at Mr. Houston's invitation.

Q. In other words, Mr. Houston was your host up there?

A. He left the cabin to us; that is, we went up there on our own.

Q. On this occasion, this other time when you were there, was Mr. Houston there? A. No.

Q. Shortly before his death, Mr. Masters, was Mr. Houston complaining about pain or physical infirmity? A. Yes.

Mr. Clausen: That is all.

The Court: Take a recess.

(Short recess taken.)

Mr. Clausen: Lieutenant Sherry, please. [114]

Mr. Angell: I had one question of Mr. Masters. I didn't know they were through with him. He was on the stand.

The Court: You may call him if you wish.

Mr. Angell: He hadn't finished with him. He was on the stand, as far as I was concerned; he was asking him some other questions on redirect.

Mr. Clausen: I was all through, Mr. Angell.

(Testimony of Richard B. Masters.)

Mr. Angell: Then I would like Mr. Masters to come back for just a moment.

Recross Examination

Q. (By Mr. Angell): You were asked on redirect, Mr. Masters, as to whether Mr. Houston happened to state: "It was too bad the comptroller didn't catch the error which had to be corrected and sent back for reprinting." Do you recall what error that was?

A. It was a situation that I mentioned, the commission differential between the companies.

Q. It was something which the comptroller himself should have picked up, is that correct?

A. Yes.

Q. Mr. Houston was kind of complaining that it hadn't been picked up and it had to be reprinted, is that correct? A. That's correct.

Q. I believe you testified on redirect that you had seen Mr. Houston in pain and physical discomfort some time. You [115] didn't fix the time and place, when or what. What did you have reference to? Your answer was "Yes." Will you just explain to the court what you had reference to?

A. Yes. All of that—the week prior to his death he was in pain from his back. He told me that he had lifted a horse trailer over the prior weekend and his back was strained and every time that he stood up or even hardly moved in his chair he would grimace and feel his back. So he said that he was—it was quite painful to him.

(Testimony of Richard B. Masters.)

Q. Did he have a painful back? A. Yes.

Q. When did you last see Mr. Houston alive?

A. On the evening of the Friday prior to Washington's Birthday holiday; about the 20th, I guess it would be, of February.

Q. About how late was that?

A. About five o'clock, just at quitting time.

Q. Where was that? At the office?

A. In our office, yes.

Q. Who was present there at that time?

A. My secretary, Miss Hoffman, and Mr. Houston.

Q. Was Mr. Houston ordinarily a cheerful, happy sort of person, or was he by nature a morose, depressed and meditative sort of person?

Mr. Clausen: Just a minute. We will object to that [116] on the ground it calls for the conclusion of this witness. Counsel himself made objection along that same line to questions that I asked.

The Court: Develop the facts, whatever they be. Reframe your question.

Mr. Angell: I have no objection to making this witness my own witness, for this purpose.

Q. Did you, through the years that you knew Mr. Houston, have opportunity to observe his moods, as to whether he was happy or unhappy by nature?

A. I did have the opportunity.

Q. And did you observe whether he was given to depressions or moodiness?

Mr. Clausen: Object to that—pardon me, your Honor.

(Testimony of Richard B. Masters.)

Mr. Angell: I asked if he observed. It is preliminary.

The Court: You may answer "Yes" or "No."

A. Yes.

Q. (By Mr. Angell): Now, my first question is, describe to the court, as near as you can, Mr. Houston's disposition, as you observed it, with respect to whether he was happy or whether he was a moody person or a depressed person; was he an introvert or extrovert, in your opinion?

Mr. Clausen: Object to that, your Honor, as calling for the opinion and conclusion of the witness.

The Court: It goes to the weight of the testimony. [117] Objection overruled.

A. Mr. Houston was an extrovert. He was probably the least moody person that I know of. He was a very congenial, happy soul.

Q. (By Mr. Angell): Did you observe any difference from the usual pattern or norm of Mr. Houston's behavior on the night of Friday just before the Monday of Mr. Houston's death?

Mr. Clausen: Your Honor, we object on the same ground, and so that I won't be interrupting, may my objection run to this line of testimony?

The Court: Let the record so show. The objection will be overruled.

A. On the Friday Mr. Houston was just a little quieter than he would be in the early part of the week, but anyone, after a week in the office, would be in the same condition, I am sure.

(Testimony of Richard B. Masters.)

Q. (By Mr. Angell): Did you observe, did he appear to be happy?

A. He seemed to be as happy as normal, yes.

Q. Did Mr. Houston ever discuss with you or state anything to you about self-destruction?

A. Never.

Q. Did you have any plans with Mr. Houston or know of any plans of Mr. Houston for the following week after the Fourth of July—pardon me—the Washington Birthday of February [118] 22nd?

A. I don't recall any specific plan.

Q. You know of nothing that was planned by him or he had nothing with you on your calendar, is that right?

A. No, the only thing we were planning together was the attendance at the annual meeting of the Fire Underwriters Association of Philadelphia, which takes place, as I say, annually, and we had planned on that. That would be in the early part of March, just about two or three weeks from then.

Q. You were making plans for that?

A. Yes.

Q. Do you know of any time when the top officers of the New Zealand Company, or any of those other British companies, were over here, did they ever make any trips up to southern Oregon with Mr. Houston, or that ranch, that you know?

A. Yes.

Q. And they knew him well enough to associate with him closely and make trips to the ranch with him, is that right?

A. They did.

(Testimony of Richard B. Masters.)

Q. And go up to Lakeview, Oregon?

A. That's right.

Q. And you yourself went up with your family, did you not? A. That's correct.

Q. Was Mr. Houston ever up there when you were there?

A. Not when my family was there. [119]

Q. Not with your family? A. No, sir.

Mr. Angell: You testified as to the time you were there. Thank you.

Redirect Examination

Q. (By Mr. Clausen): Mr. Masters, in response to counsel's question you say that representatives from the home office made trips to Lakeview, Oregon, with Mr. Houston? A. That's correct.

Q. Who among those home office people did that?

A. Sir James Gunson and Mr. O'Brien, I believe. Both the general manager and a member of the board of directors.

Q. Do you know what these representatives from the home office found out about Mr. Houston's activities up in Lakeview?

A. I haven't the slightest idea.

Mr. Clausen: That's all.

Recross Examination

Q. (By Mr. Angell): Whatever they found, did it seem as far as you observed to disturb their relations with him?

Mr. Clausen: Just a minute. Just a minute——

(Testimony of Richard B. Masters.)

Mr. Angell: You asked this question.

Mr. Clausen: Pardon me—pardon me——

Mr. Angell: I didn't.

Mr. Clausen: Just a moment. Your Honor, we certainly object to that on the ground it calls for the conclusion of the [120] witness. Counsel asks whatever somebody found out did it disturb Mr. Houston.

Mr. Angell: No, I didn't ask whether it disturbed Mr. Houston. I asked whether it disturbed the relationship of these officers of the corporation toward Mr. Houston.

Mr. Clausen: And, your Honor, we respectfully submit that that not only calls for the conclusion of the witness but it is fairly incompetent on other grounds.

The Court: If he knows, he may answer. Objection overruled.

A. Your exact phraseology——

The Court: Reframe the question.

Q. (By Mr. Angell): You were asked the question by Mr. Clausen if they made any observation as to what they found out about Mr. Houston when they went up there with Mr. Houston, which carried the inference with it, I take it, that they found out something that they shouldn't have, and my question is: Did you observe any different attitude of those officers and directors of the company toward Mr. Houston after they came back, regardless of what they found out?

A. For the record, I was not a member of the

(Testimony of Richard B. Masters.)

New Zealand Insurance Company when they went up there.

Q. Oh, so you didn't observe this time when they came back?

A. I don't have the slightest idea what took place, except there was a hunting-fishing trip. [121]

Mr. Angell: Thank you.

(Witness excused.)

Mr. Clausen: Lieutenant Sherry, please.

R. T. SHERRY

a witness called on behalf of the defense; sworn.

The Court: Your full name, please.

A. R. T. Sherry.

The Court: Where do you reside?

A. Berkeley.

The Court: Your address.

A. 1555 Sacramento Street.

The Court: Your business or occupation?

A. Lieutenant of Police.

The Court: How long have you been in the police department?

A. Twenty-five years.

The Court: In Berkeley?

A. Yes, sir.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Clausen): Your present assignment now is what, Lieutenant Sherry?

A. Superintendent of Records.

(Testimony of R. T. Sherry.)

Q. You had that assignment for how long?

A. Intermittently for fifteen years. [122]

Q. During the course of your activities were you asked and subpoenaed since this morning, I believe, to bring to this court the records pertaining to the death of Mr. Houston in February of last year?

A. I was.

Q. And have you those?

A. I do. (Witness producing.)

Mr. Clausen: May the record show, your Honor, that the witness is handing me—I might stand here, your Honor, so that the witness can go over these with me—first, there is a card——

The Court: I suggest you ask the witness what they are.

Mr. Clausen: All right, your Honor.

Q. Just take those and tell me one by one what those items are, that you have in your hand.

A. This printed card is entitled "Casualty Report," is the initial report of any accident which is reported to the police.

Q. Very well.

A. The next, 5x8 manila envelope, contains photographs taken by Officer Wilen concerning this accident.

Q. How many photographs are in there, Lieutenant Sherry?

A. Three different views, with a total of seven copies.

Q. Three different views of what, Lieutenant Sherry?

(Testimony of R. T. Sherry.)

A. One view, the view of the body, viewed from the back; [123] the other view is of the body viewed from an angle in front; the other views show a lever action rifle on a surface.

The next report is signed by Inspector Parker and dated 9:30 A.M., March the 4th, 1954.

Q. Very well.

A. The next report is an investigational report signed by Inspector Parker, February the 23rd, 1954, 9:50 A.M.

The next report is by Officer K. C. Pine, dated March 29th, 1954, 11:30 A.M.

The next is a form report showing the photographer's expenditure of time.

The next report is a printed report titled "Coroner's Register—Inquest"—no date.

The next attachment is a manila envelope containing Coroner's receipt No. 13795, "One body, of William M. Houston," dated February 22nd, 1954.

The next report is the case summary for the Alameda County Coroner, which is signed by Inspector E. F. Parker, February 23rd, 1954, and the time 10:25 A.M.

The next attachment is a 5x8 manila envelope, which is empty. It contained the original notes of Officer K. C. Pine, and a receipt for the rifle. The notation on this rifle indicates that these enclosures were removed November the 7th, 1955, by Officer Pine.

The next report is an investigational report signed

(Testimony of R. T. Sherry.)

by [124] Officer K. C. Pine on February 22nd, 1954, and timed at 4:25 P.M.

Q. Lieutenant Sherry, I will put the rubber band around those—and I will ask, your Honor, that those be marked for identification.

The Court: It may be admitted for purposes of identification.

(Group of police reports, Berkeley Police Department, produced by Lieutenant Sherry, marked for identification Defendant's Exhibit F.)

Mr. Clausen: And I state to Lieutenant Sherry and to the court that I intend to use them (Exhibit F) in the future examination, to which reference was made this morning, when Inspector Pine and Mr. Parker were on the stand and we stated we were going to subpoena these records.

Now, may I ask Lieutenant Sherry if it is satisfactory that these remain in the custody of the Court Clerk pending the trial of this case and to be then returned to Lieutenant Sherry for photostatic copies made and retained by the court?

A. It is. Those, I would like to say—they are the only copy—they are original reports, and while they have been statistically tabulated, we would like to keep track of them.

Mr. Clausen: Yes. Very well. That is all. [125]

Cross Examination

Mr. Angell: Just one or two questions, your Honor.

(Testimony of R. T. Sherry.)

Q. Lieutenant Sherry, you yourself had nothing to do with the investigation of this event, or the death of Mr. Houston, had you?

A. I did not, no, sir.

Q. And your connection with this is as a lieutenant of the police department in charge of the records, is that correct? A. Right.

Q. Was there anything unusual about the handling of these particular records in this case as to your usual practice in the Berkeley Police Department? A. There was.

Q. Will you state to the court what that was?

A. Following a conference with Inspector Parker and the acting chief, myself present, it was decided that the report would be made available to both sides in the event of a controversy.

Q. Was any reason given in that discussion for that?

A. Because we could not come to a positive conclusion as to whether it was—as to what the cause of death was.

Mr. Angell: That is all.

Mr. Clausen: I have no questions, Lieutenant Sherry, at this time. [126]

The Court: Numerically, how many of these reports are there? How many reports are there, so that the Clerk will have it?

Mr. Clausen: Would you count them, Mr. Clerk, please?

The Clerk: Eleven pieces of material, three of which are envelopes.

(Testimony of R. T. Sherry.)

Mr. Clausen: We will call the representative here from the London Guarantee Corporation.

May Lieutenant Sherry be excused, your Honor?

The Court: I have no objection. You may be excused.

Mr. Angell: Oh, yes, as far as we are concerned.

(Witness excused.)

WATSON MANWARING CONNER

a witness called on behalf of the defense; sworn.

The Court: Your full name, please.

A. Watson Manwaring Conner.

The Court: Where do you reside?

A. 131 Almenar Drive, San Rafael.

The Court: Your business or occupation.

A. Regional superintendent, Phoenix of London Group.

The Court: How long have you been so engaged?

A. I have been with them just under ten years.

Direct Examination

Mr. Clausen: Q. Mr. Conner, did you bring here, in response to a subpoena, certain records of the firm by whom [127] you are employed?

A. I did.

Q. And your position with that firm is what?

A. Regional loss superintendent.

Q. And that firm is what firm?

A. It is the Phoenix of London group of companies, London Guarantee and Accident.

Q. And does it do business for and with the

(Testimony of Watson Manwaring Conner.)
New Zealand Insurance Company that is involved in this case?

A. It insured the New Zealand Insurance Company for comprehensive liability coverage.

Q. Was there a loss reported in respect of that policy of insurance? A. Yes.

Q. Covered by that file? A. Yes.

Q. When did that loss occur?

A. October 19th, 1953.

Q. And what is that that you have in your hand, Mr. Connor? A. It is a liability claim file.

Q. Would you just tell me what is in there, the various pages and papers and things?

A. This covers the details in connection with an accident of October 19, 1953, with the New Zealand Insurance Company as the named insured; William A. (sic) Houston is the driver, [128] and Mrs. Vivian Chipman is the claimant.

Q. Mrs. Vivian Chipman? A. Yes.

Q. What are the other papers that you have there in your hands; on the right-hand side there are some papers?

A. Copies of drafts, preliminary action report, releases, one signed statement, and an independent adjuster's report.

Q. And the independent adjuster's name was what? A. J. W. Van Doren.

Q. And made where? Where is his office located?

A. 210 Williams Building, Klamath Falls, Oregon.

(Testimony of Watson Manwaring Conner.)

Q. Is there a release in there signed by Vivian Chipman? A. Yes.

Q. Dated what? A. October 20, 1953.

Q. You said something about a report by this independent adjuster. Which part of the record is that report? A. Right here; the yellow.

Q. The yellow pages. All right. Are these records customarily kept in your files in this form?

A. Yes.

Q. You keep them what, in the ordinary course of business? A. Six years.

Q. Beg your pardon?

A. For six years. [129]

Q. In the ordinary course of business in handling a claim, are they assembled and kept in that fashion? A. Yes.

Q. And were these on this particular occasion so done? A. Yes.

Mr. Clausen: All right. We will relieve you of that, if I may.

I will ask that this be marked for identification, your Honor.

Mr. Angell: May I ask one question? Pardon me. Are you through?

Mr. Clausen: Yes.

Cross Examination

Mr. Angell: Q. Did you have any conversation or discussion with Mr. Houston regarding this claim? A. No, not personally.

Q. Do you know whether Mr. Houston saw the

(Testimony of Watson Manwaring Conner.)

record of the adjustment in this matter, of your own personal knowledge? A. I don't.

(Witness excused.)

(Claim File, produced by witness Conner, marked for identification Defendant's Exhibit G.)

Mr. Clausen: Your Honor, we are going to read into evidence at this point the deposition of Miss Pearson.

Mr. Angell: Are you going to offer—— [130]

Mr. Clausen: This is the deposition of Jean Pearson, taken by the defendants October 26th, 1955, and I am going to read a portion into evidence, your Honor. The preliminary part is to the effect that——

Mr. Angell: Well, just a minute, before you read that into the record. There are certain parts of this that I want to make objection to.

Mr. Clausen: I am going to read it by question and answer so that——

Mr. Angell: Then it is in the record. And I submit, your Honor, that I am entitled to know, in order to make an objection ahead of the record. I don't want to have to go through and strike the whole record. It will keep me busy just trying to keep track of that.

The Court: He is having difficulty keeping up with you.

Mr. Angell: And all that I am asking is that you tell me what parts you propose to read; I will

then be able to make my objections ahead of them being read.

The Court: How many pages are there?

Mr. Clausen: Well, I will tell you what I will do, your Honor. The deposition is very short, only goes on for five or six pages. Why don't I put my son on the stand and I will ask him the questions and he can answer them?

Mr. Angell: You mean, you read the questions, he read the answers? [131]

Mr. Clausen: Yes.

Mr. Angell: I have no objection to that procedure.

The Court: It's about time you put your son to work. Let him take the stand.

Mr. Angell: As the questions are asked, may I request that my objections go in ahead of the answer being read?

The Court: You may.

Mr. Clausen: To my knowledge of what he has in mind, I am going to read slowly so that he can object if he wants.

Mr. Angell: Thank you.

Mr. Clausen: (Reading deposition of Jean Pearson:)

"Be it remembered, that pursuant to stipulation by the counsel for the respective parties, and on October 26th, 1955, closing at the hour of 2:40 P.M. thereof, at the Lake County Courtroom, County Courthouse, Lakeview, Oregon, before me, Dorothy Julier, a notary public in and for the County of Lake, State of Oregon, personally appeared

JEAN PEARSON

called as a witness by the defendant, The Canada Life Assurance Company, who, being by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth.

“Angell & Adams, represented by Forrest E. Cooper, appeared as counsel on behalf of the plaintiff; and Messrs. Keesling & Keesling and Henry C. Clausen, Esquire, and Henry C. Clausen, Jr., Esquire, represented by Henry C. Clausen, Jr., [132] Esquire, appeared as counsel on behalf of the defendant, The Canada Life Assurance Company.

“It is stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

“It is further stipulated that the said deposition shall be reported by Lillian McDonald, an official shorthand reporter, and a disinterested person, and thereafter transcribed by her into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

“It is further stipulated that if this deposition has not been signed by the time of trial, provided the witness has had a reasonable opportunity to read, correct, and sign the same, it may be used by either party at the trial with the same force and effect as if signed by the witness.

“Jean Pearson,
called as a witness by the defendant, The Canada
Life Assurance Company, being duly sworn by the
notary public to tell the truth, the whole truth, and
nothing but the truth, testified as follows:

“Examination by Henry C. Clausen, Jr.:

“Q. Your name is what?

A. Jean Pearson. [133]

Q. Where do you reside?

A. 248 I Street North.

Q. Here in Lakeview? A. Yes.

Q. Were you ever acquainted with one William
Houston? A. I knew him.

Q. Did you ever see him wearing a coonskin
cap? A. Yes.

Q. Now, in the year 1953 in the fall of that
year were you employed? A. Yes.

Q. Where? A. Van's Cafe.

Q. And what kind of establishment is that?

A. It is a restaurant.

Q. And what was your position there?

A. I was head waitress.

Q. What were your hours?

A. Usually from five until one, except in hunt-
ing season, roundup, and we opened up at two. I
worked from two to ten, I think it was.

Q. In the afternoon? A. In the morning.

Q. In the fall of 1953 did you ever have occa-
sion to observe Mr. Houston in Van's Cafe? [134]

A. Yes.

Q. How often was that?

(Deposition of Jean Pearson.)

A. He was in a couple or three times.

Q. And was that in the month of October, 1953?

A. I believe it was.

Q. Did you have occasion to observe his demeanor in the premises there? A. Yes."

Mr. Angell: Just a minute. Your Honor, you will observe that the first time this witness saw Mr. Houston was October, 1953, if your Honor please. May we have the application? I believe that's Defendant's Exhibit A, the application.

The Clerk: Defendant's Exhibit A.

Mr. Angell: The insurance policy. What I want is a copy of the application.

Mr. Clausen: That is attached to the policy, the application, and that is Defendant's Exhibit C.

Mr. Angell: If your Honor will observe, the date on the application, 9-24-53, in the lower or about the center of the right side of that application, the date is 9-24-53. The witness here never, according to her own testimony, never knew Mr. Houston prior to October of '53. The cases are clear that statements made by a witness observing the insured after the date of the application and as to things he did [135] then have no application whatsoever as to misrepresentations in the insurance application. On that ground, we object to any questions touching upon any acts of Mr. Houston after the date of September 24th, 1953, respecting the use of alcohol.

Mr. Clausen: In the first place, this evidence is offered on both defenses, not only the misrepresentation but also, if the court please, the suicide, be-

(Deposition of Jean Pearson.)

cause the evidence here is directly linked, your Honor, to the type of individual, the kind of a man, his habits, what he was doing, and what he was doing especially in this area up there in Oregon.

Now, then, as far as the misrepresentations are concerned, the witness testifies here that in the fall of 1953—she is not confining herself to October—that she did observe Mr. Houston in Van's Cafe and, as a matter of fact, she pinpoints some to October, which is the very month that he took alcohol upon the scene, and therefore on both grounds, on the ground of suicide, on the ground of misrepresentation, the evidence is of course admissible.

The Court: I will allow the testimony to go in on the same ruling, subject to your motion.

Mr. Clausen: (Reading deposition.)

“Q. In the fall of 1953 did you ever have occasion to observe Mr. Houston in Van's Cafe?

A. Yes. [136]

Q. How often was that?

A. Oh, he was in a couple or three times.

Q. And was that in the month of October, 1953?

A. I believe it was.

Q. Did you have occasion to observe his demeanor in the premises there? A. Yes.

Q. Did he appear to have had something of an alcoholic nature to drink? A. Yes.

Q. Would you say that he apparently had a considerable amount to drink on those occasions?

A. Yes.

(Deposition of Jean Pearson.)

Q. Would you say that Mr. Houston was intoxicated? A. Yes.

Q. How did Mr. Houston act on those occasions?

A. He was overbearing and unruly, and he would try to serve himself, just take over.

Q. Did he monopolize the conversations?

A. Oh, Mr. Houston carried on a conversation with everyone when he was drinking.

Q. Would it be correct to say that in a group he acted like a 'big shot'? A. That's right.

Q. Have you ever seen anybody else in Lakeview wearing [137] coonskin caps other than following the Davy Crockett——

A. (Interrupts) No, sir.

Q. Did you observe Mr. Houston in any other place than in Van's Cafe?

A. I have seen him at Hunter's Lodge.

Q. In what condition did he appear then?

A. He appeared to be having a huge time.

Q. Was he drinking? A. Yes.

Q. Did he appear intoxicated?

A. I didn't stay out there long enough. It was early in the evenings.

Q. Who was with him?

A. I don't know. He was with Mr. Utley and their friends from San Francisco and all over Oregon and everywhere."

Mr. Clausen: You can ask the questions—my son the questions, if you want.

The Court: Or you can put one of your able assistants on, if you wish.

(Deposition of Jean Pearson.)

Mr. Clausen: It is your cross-examination. The Court suggested that you put on one of your able assistants.

Mr. Angell: I would just as soon have Mr. Clausen stay there.

I am Mr. Cooper now.

“Mr. Cooper: Q. Are you acquainted [138] with a Mr. H. A. Utley here in Lakeview?

A. Yes, sir.

Q. How many years have you known him?

A. Oh, personally three years.

Q. About three years? A. Uh-huh.

Q. Also known as and called Harry Utley, is he not? A. Right.

Q. In addition to Van's Cafe, you have also served the public as a waitress at the Hotel Lakeview coffee shop, have you not, since you lived here? A. Yes.

Q. In one establishment or both did you ever have occasion to serve meals to Mr. Harry Utley?

A. I have.

Q. Have you ever had an opportunity to observe the conduct of Mr. Harry Utley at places other than the two restaurants we have mentioned?”

Mr. Clausen: I will object to that, your Honor, as irrelevant. That is a question having to do with another party, this Harry Utley.

Mr. Angell: Association, your Honor.

The Court: Since I have been so liberal with you, I will allow the testimony to go in, subject to the same motion.

(Deposition of Jean Pearson.)

Mr. Angell: All right, your Honor. [139]

The Court: When the record is made up, why, both will be in equal position.

Mr. Angell: All right.

"A. Mr. Utley has always kept himself in place and is a very nice guy."

Mr. Angell: I think you jumped one, line 3, Mr. Clausen.

"Mr. Clausen: I will object to that question as irrelevant."

Mr. Clausen: I just made the objection now.

Mr. Angell: Then "Mr. Cooper"—I think that is what the witness said: "I have." That's the way it looks to me, because I have it as the witness.

Mr. Clausen: It looks that way to me. It looks as though the witness said "I have."

The Court: The young man on the stand can make that determination.

Mr. Clausen, Jr.: I believe that is the witness.

Mr. Angell: (Reading.)

"Q. What was the nature of Mr. Utley's deportment? Do you understand what I mean—what was the nature of his conduct?

A. Mr. Utley has always kept himself in place and is a very nice guy.

Q. You would classify him as a gentleman, would you? [140]

A. That's right.

Q. And did you ever see him and Mr. Houston together? A. Yes.

Q. Isn't it a fact that he was Mr. Houston's

(Deposition of Jean Pearson.)

host; when Mr. Houston came up here to hunt, you knew that, did you not? A. Yes.

Q. They were frequent and constant companions, were they not, during the hunting and fishing seasons? A. Right.

Q. You have never seen Mr. Utley intoxicated, have you? A. No, sir.

Q. You were subpoenaed, were you not, by Mr. Clausen? A. Yes."

Mr. Angell: That's all.

Mr. Clausen: It's five minutes to four. I have a longer deposition. Shall I go on or shall I stop?

The Court: I yield to your wishes. What is your wish in the matter?

Mr. Angell: Our wish is the court's wish.

(Thereupon an adjournment was taken until

10:00 o'clock A.M., November 8th, 1955.) [141]

The Clerk: Houston versus The Canada Life Assurance Company, further trial.

Mr. Clausen: Ready, your Honor.

Mr. Angell: Ready, your Honor.

RICHARD MASTERS

recalled as a witness on behalf of the defense; previously sworn.

Mr. Clausen: Your Honor, there was a letter testified to yesterday by Mr. Youngers, a letter written following the settlement by this woman Vivian Chipman, and I asked Mr. Masters to search for that. This morning counsel, Mr. Angell, tells me that they have located the letter; it is in

(Testimony of Richard Masters.)

the hands of one of their witnesses and that they will produce that letter and the reply by Mr. Houston, so I told Mr. Angell that so far as that is concerned it is satisfactory with me that I put it in or look at it at the time his witness appears.

May I also, your Honor, ask Mr. Angell this: The blackboard diagram here—the diagram on the blackboard—shows a hole cut in the floor and Mr. Angell yesterday stated that of course at the time of the killing the hole was not there, that this was taken out later, so I am asking Mr. Angell now if he will produce whatever was taken out from that floor.

Mr. Angell: When do you wish it produced? We expect to call, your Honor—— [142]

Mr. Clausen: Were you going to——

Mr. Angell: We expect to call Dr. Kirk.

Mr. Clausen: All right.

Mr. Angell: Dr. Kirk removed that and made certain tests on it. We will produce that.

Mr. Clausen: I am satisfied.

Redirect Examination

Mr. Clausen: Q. Now, Mr. Masters, you were asked yesterday morning if you could locate certain documents. Did you make a search, and I see that you have an envelope there on your knee, so I assume you have some material. A. Yes.

Q. Would you tell me what you found, please?

A. I have the rather complete file that I men-

(Testimony of Richard Masters.)

tioned of this cable that was sent to the chairman of the board.

Q. Yes, sir.

A. His reply to Mr. Houston; then a letter which Mr. Houston wrote explaining his action, and then the letter from the acting general manager at the time, Mr. O'Brien, acknowledging his letter, saying that the action was understood and there would be no further question regarding it.

Q. Is that all represented in that group of papers that you have here?

A. Yes. (Producing.)

Q. Thank you. [143] A. Here.

Mr. Clausen: There appears to be quite a series of letters or exchange, your Honor, so I am going to ask this group as a group be marked for identification as the defendant's next in order.

Mr. Angell: No objection. If you wish to offer them, why, we will have no objection to their introduction in evidence.

Mr. Clausen: Q. You have some additional papers, Mr. Masters?

A. I do. The file number 1838 which was mentioned in the correspondence you read yesterday, I have that copy—I don't think it is relevant at all, but I have another letter which is the one to which I was referring, which was shown to me, and incidentally which I had read on December 21, 1953—I had seen it, but it had slipped my memory completely. That is the reference that is made to the accident.

(Testimony of Richard Masters.)

Q. All right.

A. Only that first page is relevant.

Mr. Clausen: The two documents, again, your Honor, they appear to be in scope several pages. I am not going to take the time now to go into them, but I would ask that they be marked for identification as one exhibit, the two separate documents.

Mr. Angell: I notice there are certain markings on this document. What exhibit was that for identification? [144]

The Clerk: This is Exhibit H for identification.

The Court: It will be admitted and marked for purposes of identification.

(Group of documents, letters and cables, marked for identification Defendant's Exhibit H.)

(Group of letters dated December 18, 1953, and January 4, 1954, marked for identification Defendant's Exhibit I.)

Mr. Angell: There are certain marks on here in ink (referring to Defendant's Exhibit I for identification).

Mr. Clausen: Marginal marks?

Mr. Angell: Yes. And the words in ink, "Reins file." (To witness:) Is that the way you would construe it?

A. That means Reins insurance file.

Mr. Angell: Reins insurance file. And then there is an ink line down on the left margin with a sign of some kind; it runs between paragraph 1 and to

(Testimony of Richard Masters.)

the close of 3. Could you state for the record what that mark is and who put it there and why?

A. I just put that on and solely to point out the relevant paragraphs.

Mr. Angell: When did you put that on?

A. Just this morning; just a few minutes ago.

Mr. Angell: Is the same true as to the ink mark?

A. The rest of that is just pertaining to Reins insurance, an entirely separate subject. [145]

Mr. Angell: What were those marks intended to indicate, the part that was pertinent to the inquiry?

A. That's right. The other mark on that second page, I don't know when that was put on.

Mr. Angell: That's the pencil mark with an "X"?

A. Yes. That has no bearing on it. I think that was to indicate——

Mr. Angell: You do not know when it was put there? A. No.

Mr. Angell: Or by whom? A. No.

Mr. Angell: What is your answer?

A. That's right, I do not know.

Mr. Clausen: Q. You have some other papers, Mr. Masters?

A. The only other thing I was requested to bring in, the claim file, on our physical damage loss to the car. The only thing I have is a receipt given by the defense attorneys, Mr. Keesling, for

(Testimony of Richard Masters.)

Kathleen Blanchard, so that file must be in the defense files somewhere.

Q. You are speaking of the collision file?

A. That's right.

Q. That was referred to in the deposition?

A. Yes.

Mr. Clausen: All right. That's all I have, Mr. Masters. Thank you. [146]

Mr. Angell: As I understand it, you have not offered those letters.

Mr. Clausen: No, I am going to read them, counsel, during the recess, to save the court's time, and see if they are pertinent, and introduce them if they are or offer them.

Mr. Angell: Only so that the witness won't have to stay around here, may I look at them?

Mr. Clausen: As far as I am concerned the witness may be excused.

Mr. Angell: Well, I have a few questions.

Mr. Clausen: I mean from the courtroom when you are through.

Mr. Angell: When you offer them in evidence I might want to ask some questions, and I am trying to shorten this up by asking them now so he won't have to come back.

Recross Examination

Mr. Angell: Q. Mr. Masters, did you know whether there was any correspondence or look for any correspondence in the file subsequent to this letter referring to the accident, which is dated the

(Testimony of Richard Masters.)

18th of December, 1953, to see whether there were any letters which was complimented Mr. Houston for the work he was doing for the company?

A. Yes.

Q. And have you those letters here?

A. I believe copies were turned over to [147] you, photostatic copies were turned over to you.

Q. Where are the originals?

A. In our files.

Q. Do you have them here? A. No.

Q. Nor has Miss Hoffman? A. No.

Mr. Angell: Have you any objection to my using the photostats? I will be glad to furnish you copies.

(Discussion between counsel, beyond the hearing of the reporter.)

Mr. Clausen: No, I have no objection, if the witness identifies these, Mr. Angell.

Mr. Angell: Q. I will show you the first letter, which bears a February 5th, 1954, date, purporting to come from the New Zealand Insurance Company, Limited, and ask you if you have ever seen the original of that document. (Handing witness.)

A. Yes.

Q. And is the original in your file?

A. It is.

Q. And is the letter or what purports to be a letter, from the person signing the letter, to the office here in San Francisco, from the New Zealand Insurance Company? A. It is.

Q. And this is a photostatic copy, is that correct? [148] A. That is.

(Testimony of Richard Masters.)

Mr. Angell: I will offer this in evidence as Plaintiff's exhibit next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Thereupon letter dated February 5, 1954, from New Zealand Insurance Company to San Francisco office, received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Angell: This, your Honor, is dated February 15th, 1954, received at San Francisco, approximately two months after the previous letter offered for identification, as Defendant's Exhibit I for identification, and the letter says—skipping the printed portion:

"I was delighted to hear that your negotiations with Mr. Mylod were brought to a successful conclusion inasmuch as you are to receive 3 per cent of his First Fire Surplus Treaty upon a sliding commission basis. I note too that you will be affording the 'Pacific National' reciprocal business from our own First and Second Surplus Treaties as from 1st July, 1954.

"2. You are to be congratulated on this happy outcome of your negotiations, as I feel quite assured that under Mr. Mylod's careful management the Pacific National Fire Account is well worth while.

"3. As you know, I wrote to Mr. Mylod [149] at your suggestion and received in return a very

(Testimony of Richard Masters.)

pleasant note in which he expressed satisfaction that our two companies are again to be closely associated." Signed—and I can't read the signature.

Q. What is the signature, Mr. Masters?

A. W. J. O'Brien.

W. J. O'Brien, general manager? A. Yes.

Mr. Angell: And this letter, your Honor, is dated just seven days prior to Mr. Houston's death. I notice that this refers to "Subject file" and a file number 1843, 7.1.54. It does not show who this letter is addressed to.

Q. Do you know whether Mr. Houston ever saw it and who that refers to as handling that business (handling witness)?

A. This letter was received by Mr. Houston's secretary in the customary procedure and then would have been sent by him, because it bears his stamp.

Mr. Clausen: We will ask that go out, your Honor, as pure conjecture and speculation, what would have been. The witness is assuming and it is not what would have been but what he knows. He apparently does not know.

The Court: Indicated with the stamp. What about the stamp?

A. There is a stamp "United States Manager." which was customary, when it was read by the manager, he stamps it.

Mr. Clausen: I ask the answer go out, for [150] the reason that I assigned.

The Court: What reason did you assign?

(Testimony of Richard Masters.)

Mr. Clausen: That it is pure conjecture on his part. He was asked the question if he knew whether Mr. Houston saw it; what he is saying is that he assumes Mr. Houston saw it.

The Court: I will sustain the objection. Reframe your question.

Mr. Angell: Q. Was there any mark that persons in the New Zealand office here in San Francisco at that time put on correspondence when they read the correspondence as a matter of office and customary procedure?

A. Yes, it was customary for the United States manager to stamp correspondence when he had read it.

Q. That was part of the——

Mr. Clausen: Pardon me, counsel. May the other answer go out, your Honor, as to which you sustained an objection?

The Court: Yes.

Mr. Clausen: I moved to strike it.

The Court: Yes.

Mr. Angell: Q. Was that the regular, usual and customary procedure in the office at that time?

A. It was.

Q. And does that exhibit that you hold in your hand, Plaintiff's Exhibit 2, bear such a stamp?

A. It does. [151]

Q. And does that stamp indicate or did it at that time that it was put on there that Mr. Houston had read it?

Mr. Clausen: Just a moment. We will object,

(Testimony of Richard Masters.)

your Honor, on the same grounds, there is no proof here that Mr. Houston saw it. The witness does not claim to know. What he is testifying to is the usual practice. We object on that ground.

The Court: You have offered it on the custom?

Mr. Angell: That's right; the usual practice.

The Court: Is that the usual practice?

A. It was the usual practice.

The Court: The record stands. The objection is overruled.

Mr. Angell: Q. Now, the subject matter of the letters refers to your negotiations with Mr. Lloyd Mylod. Could you tell us what those negotiations were, of your own knowledge, if you know of your own knowledge?

A. They were purely reinsurance negotiations between two companies.

Q. Who carried on those negotiations in your office with Mr. Mylod? A. Mr. Houston did.

Q. Thank you. I will show you a letter dated—which purports to be on the letterhead of the New Zealand Insurance Company, dated February 15th, 1954, and it is dated the 5th [152] of February, 1954, and purports to be addressed to the San Francisco office, and ask you if you ever saw the original of that letter. A. Yes.

Q. Where is it? A. It is in our file.

Q. Is that a photostat taken from the file under your direction? A. It is.

Q. And that is a true, correct copy?

A. It is.

(Testimony of Richard Masters.)

Q. I notice, like the previous exhibit, Plaintiff's Exhibit 2, this is addressed to the San Francisco office. That was the customary way of addressing letters, is that correct? A. Yes.

Q. And this purports to be a signature, the general manager, Mr. O'Brien—what did you say his initials are? A. W. J.

Q. W. J. O'Brien. And is that what it purports to be—you know Mr. O'Brien's signature?

A. That is correct.

Mr. Angell: I offer this in evidence as Plaintiff's Exhibit next in order.

(Discussion between counsel outside of hearing of the reporter.) [153]

Mr. Clausen: Is this one of the two that you showed me?

Mr. Angell: Yes.

Mr. Clausen: Well, I have seen it, then.

Mr. Angell: Offer it as Plaintiff's Exhibit 3.

The Court: No objection.

Mr. Clausen: I have no objection.

The Court: Let it be admitted.

The Clerk: Plaintiff's Exhibit 3 admitted and filed into evidence.

(Thereupon letter dated February 5, 1954, received at San Francisco office, from New Zealand Insurance Company, received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Angell: Now, this, your Honor, for the purposes of the record, I would like to read it into the record. It is dated the 5th day of February,

(Testimony of Richard Masters.)

1954, and from New Zealand, and received and marked on the letter—received in the San Francisco office on February 15th, 1954—again, just seven days prior to Mr. Houston's death. Skipping the subject matter at the top, which has nothing to do with it, or I think it should be in the record—"Subject: Boston Insurance Company Inward USA Fire Treaty.

USA Outward First Surplus Fire Treaty

USA Outward Second Surplus Fire Treaty."

And then on extreme right-hand corner, "Subject file."

"I was interested to hear that following your visit to [154] Philadelphia, during the course of your recent eastern trip, you had secured a 3 per cent participation in the First Surplus Fire Pool of the Boston Insurance Company, and that you will have to provide reciprocity from our own First and Second Surplus Treaties to the extent of 10 per cent, which from the computation you have given in regard to the 'Pacific National' income would seem to be somewhat more than will be required to balance the accounts. I would have thought 7½ per cent of our Treaties would have been more appropriate.

"2. I raise the matter not in any carping spirit as indeed I share your own satisfaction that we are to participate in the First Surplus Treaty of such a splendid Company as the Boston, but from the point of view of the sharing of our own First and Second Surplus Fire Treaties, I am somewhat con-

(Testimony of Richard Masters.)

cerned as you suggested redistribution as far as affects the Fireman's Fund Office.

"3. I will deal further with the subject in my reply to your letter 1845 in regard to the Employers' Fire Insurance Company Treaty. By the way, I assume you will have to pay Messrs. Balis & Company commission as Brokers for introducing the business.

"4. I would like to offer you my congratulations in regard to your successful efforts in having the Treaty business of both the Pacific National and Boston Companies included in your 1953 Underwriting Accounts." [155]

I think that is all. Beg your pardon, Judge. I want to ask a question.

Q. Does that letter, Plaintiff's Exhibit 3, bear any indication or any mark that Mr. Houston had read that letter?

A. It bears the stamp of the United States manager, February 15th, 1954.

Q. And your testimony in regard to that stamp would be the same as to Plaintiff's Exhibit 3, the letter that you are holding, as it was to Plaintiff's Exhibit 2, with regard to these markings?

A. Right.

Mr. Angell: No further questions.

Mr. Clausen: Of course, my objection, your Honor, is the same to this as it was to the other, and as to which I assume your Honor would make the same ruling.

The Court: The objection will be overruled.

(Testimony of Richard Masters.)

Mr. Clausen: I have no questions. So far as I am concerned Mr. Masters may be excused, your Honor.

The Court: May he be excused?

Mr. Angell: At this time. I might want to recall him.

The Witness: Would I be permitted to correct a statement made yesterday?

The Court: Certainly.

The Witness: I want to correct a statement made yesterday because the answer is so obvious. I intended to add [156] one sentence to my statement and then we were interrupted by discussion between counsel and I didn't have the opportunity. You asked me whether our head office——

Mr. Clausen: When you say "You"—for the record, you mean——

A. Counsel, defendant's——

Mr. Clausen: Myself?

The Witness: Defendant's.

Mr. Clausen: Clausen is my name.

The Witness: Clausen. Thank you. Mr. Clausen asked me if our head office would be interested or our officials would be interested in the personal lives of their people over here in the United States.

Mr. Clausen: Yes.

The Witness: And you asked me—or Mr. Clausen did: Do you know that that is the case? My answer was: No. And what I wanted to add was: I do not know that is the fact, but I assume, it

(Testimony of Richard Masters.)

being common business practice, that they would be rather interested in the business lives—the personal lives of their people here.

Mr. Clausen: Yes.

The Witness: That was all I wish to add for the record.

The Court: All right, you may be excused.

(Witness excused.)

Mr. Clausen: We offer in evidence, from the file which [157] is marked Defendant's G, the report of the insurance adjuster which was referred to yesterday, dated October 22nd, 1953, marked J. W. Van Doren, Insurance Adjuster at Klamath Falls, Oregon: "Personal and confidential" to "London Guarantee and Accident Company, Ltd."

Mr. Angell: May I see that?

The Court: Show it to counsel.

Mr. Clausen: The foundation for this was laid yesterday afternoon, if the court please, and the testimony of Mr. Manwaring Conner——

Mr. Angell: Pardon me. But are you offering this lengthy file in a bundle?

Mr. Clausen: I am only offering the adjuster's report.

Mr. Angell: Just the report?

Mr. Clausen: The report of the adjuster.

Mr. Angell: Just the report?

Mr. Clausen: Yes.

Mr. Angell: I hold in my hand an exhibit which is marked with the Clerk's stamp "Defendant's Exhibit G."

Mr. Clausen: Exhibit G.

Mr. Angell: I think this was for identification. Was it not?

Mr. Clausen: That's right.

Mr. Angell: It says for identification. Now, what I am asking is, are you offering just the adjuster's report? [158]

Mr. Clausen: That is all I am offering.

Mr. Angell: In other words, Mr. Van Doren's report, or are you offering the entire file?

Mr. Clausen: I have said several times, I am offering the report of the adjuster.

Mr. Angell: Then I will request that the report be taken out of the file, your Honor, and treated as a separate record so that I may direct my objection to that one document and not to a stack of documents.

The Court: Now, in relation to this method of proceeding, I think that the usual practice is to offer any of those articles in evidence.

Mr. Clausen: You mean the whole file?

The Court: No, not the whole file. You can put the file in for purposes of identification but not stop there. What is the purpose of offering it?

Mr. Clausen: I am merely offering the report of the adjuster. However, I am perfectly willing to offer the whole file, your Honor. I offer it. I will do that, offer the whole file, surely. It's all banded together too, Judge—I mean your Honor. You see, it is stapled together. I would just as soon offer the whole file.

The Court: Well, now, you mustn't stop there.

That file doesn't mean anything to me unless it is developed whether or not it will go in evidence.

Mr. Clausen: Oh, well, your Honor——

The Court: Give counsel an opportunity to object. He may not object.

Mr. Angell: I can make my objection right now, your Honor, the formal objection to encumbering the record with immaterial and inadmissible evidence, because it just takes time to get it out of the record. I am going to make my formal objection. You will recall, your Honor, that I asked the witness on the stand yesterday if he personally had compiled this file, if he knew anything about it. He said no. I asked him if Mr. Houston had ever discussed this matter with him, and he said no. I asked him: Did Mr. Houston ever see this file? He said no. I therefore think that the answer is clear, that the file is not admissible, because it is not shown that Mr. Houston ever saw it. There are notes of the adjuster, a report of the accident; whatever statements are in there are wholly hearsay to Mr. Houston. They are by the insurance carrier adjuster who was adjusting this loss, and to have us swallow this whole file, the personal notes of the adjuster taken up there at Lakeview at the time of the accident, I think is——

The Court: You indicated at the very outset that you had no objection to it going in.

Mr. Angell: I didn't mean to. If I did so indicate——

Mr. Clausen: In answer to that, your Honor——

Mr. Angell: Pardon me, Mr. Clausen. I think

you Honor refers—I have no objection except the formal objection that they are not admissible because they have not been in any way connected with Mr. Houston or have shown to have been within his knowledge. There are two issues in this case; one, that Mr. Houston died accidentally or by his own hand; two, was Mr. Houston's statement in his application that he drank occasionally and was a social drinker and didn't use alcohol to excess, were they false representations so as to affect the validity of the insurance that the defendant is here trying to avoid. Now, I say that these notes on the accident by an adjuster employed by a company—he was not employed by Mr. Houston. Mr. Houston didn't make the notes; there is no evidence he ever saw the notes, so he couldn't obviously have had these notes in mind at the date of his death so that they could in any way have affected his mental thought toward this accident. And as to drinking, there is nothing shown in here that Mr. Houston knew what was said here so that he would have any attempt to refute it.

That's the only basis of my objection and it is a formal one. Other than that, why, I said I had no objection. Well, maybe that's like stating a three-page objection, you Honor, and then saying, your Honor, well, I don't stand on it anyway. But I do stand on it strictly, and to avoid encumbering the record. [161]

Mr. Clausen: Now, in answer to that, your Honor, may I recall to the court the testimony of Mr. Youngers. First, we had the testimony of Mr.

Youngers that there was a report from Mr. Houston himself; following which Mr. Youngers, at the request of Mr. Houston, took the action which, your Honor, resulted in the employment of this very insurance adjuster, J. W. Van Doren, and that was further elaborated on by Mr. Youngers in his deposition which we have right here on file. So, if the court please, this action is the action taken by Mr. Youngers, the employee of Mr. Houston, at the request of Mr. Houston. Then, your Honor, when Mr. Youngers was here on the stand yesterday I developed the fact that this was done. I then asked Mr. Youngers did he have the papers. He said no. And so then I subpoenaed from the man, Mr. Conner, who brought them, and Mr. Conner, your Honor, laid the foundation that these were the records and that they were kept in the ordinary course of business and that they referred to this particular matter. This is the matter that we have had considerable testimony on concerning the episode in this Cadillac.

The Court: Well, in order to have a proper record, you will have to take every one of those documents separately and offer them.

Mr. Clausen: All right, your Honor.

The Court: So as to give him an opportunity to object.

Mr. Clausen: I offer, then, to start with, the report [162] of J. W. Van Doren, the insurance adjuster, dated October 22, 1953. They comprise this yellow report here in the file, your Honor.

Mr. Angell: Same objection as made before, in-

competent, irrelevant, immaterial, not within any issue of the case, strictly hearsay as to Mr. Houston or any plaintiff in this action, and that they are self-serving declarations by someone not connected in any way with Mr. Houston.

The Court: Note the objection. The objection will be overruled, subject to a motion to strike.

Mr. Angell: I request that these exhibits be read in evidence, your Honor, as the exhibits are when and if given.

Mr. Clausen: I have no objection. This, your Honor, is marked "Personal and confidential." It is addressed to the London Guarantee and Accident Company, Ltd., 360 Pine Street, San Francisco 4, California. I will leave out the numbers and policy numbers, and so forth:

"Gentlemen: This will confirm telephone assignment on this case from Mr. Paul Youngers of New Zealand Insurance Company, and furnish report of my activities in accordance with this assignment.

"Mr. Youngers was unable to make contact with me until approximately five P.M. on October 20th. I was asked to immediately make a trip to Lakeview to contact Mr. William M. Houston, United States Manager for New Zealand Insurance Company, [163] who was in Lakeview, and had been involved in an accident while driving a Cadillac sedan owned by New Zealand Insurance Company. I was able to make telephone contact immediately with Mr. Houston and arranged to meet him at Hunter's Motel in Lakeview at 10:30 p.m. that night.

“This accident occurred sometime after midnight in the early morning hours of October 19, 1953. The definite time was not established, although it was probably between 1:30 and 2 A.M. Mr. Houston had been in Lakeview for some time staying at one of his ranches, and he had invited Mr. Alton F. Irby, Jr., of A. F. Irby & Company, 40 Pryor Street, S.W., Atlanta, Georgia, to visit him and enjoy some bird hunting. Mr. Houston and Mr. Irby had come into the bar of the Hunter’s Motel at approximately 11:30 P.M. on Sunday night, October 18th, where they met, allegedly for the first time, Vivian P. Chipman. They became acquainted and had one drink at this bar. The bar closes at twelve, and apparently this association of the three people proved to be mutually congenial and stimulated the mutual desire on the part of all three for further comradeship and association. It was then decided that the three of them would drive to Alturas, California, which is approximately 56 miles from Lakeview, where they could attend a dance and would find bars open until 2:00 A.M. The three of them then started out in the Cadillac sedan for Alturas, and after traveling about 45 miles and getting to a point [164] within 11 miles north of Alturas, they met with an accident.

“This accident occurred in an area known as Chimney Rocks, and at a point where a new highway is being constructed, and apparently the accident took place right at the junction of the new highway with the old highway. The section of new highway at this point is not completed and is bar-

ricaded off. The new highway is on a graded roadbed higher than the old highway. Mr. Houston, who admits he was traveling 60 to 65 miles an hour, was confronted with several deer crossing the highway directly in front of him. He tried to avoid hitting the deer by swerving to his left and trying to get onto the new highway roadbed. He hit the flimsy barricade and apparently swerved out of control, going into the area between the new roadbed and the old highway. This was an uneven surface, and the car jostled and tipped back and forth for some distance before coming to a stop.

“Mr. Houston feels sure that the car did not overturn, but that it was tipping badly from side to side.

“Apparently Mr. Houston was thrown from the car, but it is my understanding Mr. Irby and Vivian Chipman rode with the car until it stopped. After it stopped Mrs. Chipman was lying on the floorboards under the dash.

“They apparently remained at the scene of the accident until an approaching car stopped, which picked the three of them up and returned them to Lakeview. After arriving in [165] Lakeview, Mr. Houston arranged for Gordon Long, automobile repairman, to have the car picked up at the scene of the accident and brought back to Lakeview. This was done through the tow truck service furnished by Glos Motor Company, who are Oldsmobile-Cadillac dealers in Lakeview, but who do not have any automobile repair shop.

“We have a situation here of two prominent busi-

nessmen being involved in an accident causing injuries to a very attractive young lady, of rather doubtful character and background, under circumstances not entirely complimentary to Mr. Houston and Mr. Irby. There was the background of drinking and some possibility of successful prosecution of just claim against Mr. Houston and the New Zealand Insurance Company.

“Vivian P. Chapman is 26 years of age, resides at 8635 Trojan Street, Novarro, California. She claims to be a divorcee, having secured a divorce approximately six months ago from Dale Chipman in Los Angeles. She has one child, a daughter, who will be seven years of age October 23rd. Mrs. Chipman claims to be a bar girl, and formerly worked for Pig’n Whistle in Los Angeles, and that she averaged \$150.00 a week, including her salary and tips.

“She was taken to W. P. Wilbur, M.D., for examination. X-rays were taken of her chest and it was determined by Dr. Wilbur that she was suffering a separation of the sternum, and she had a hematoma on the low back region just above the left [166] hip. She was somewhat dazed and confused from the impact of the accident, although I don’t believe there was history of unconsciousness to indicate concussion of any degree. The doctor wanted to hospitalize her at the Lakeview Hospital, but she refused to submit to this treatment, feeling she would be better off in a motel room at Hunter’s Motel. Mr. Houston and Mr. Irby were very solicitous for her welfare and did everything possible to

provide for her comfort, probably going somewhat beyond the bounds of ordinary care and attention that one generally finds in a situation following an accident.

“There is some element of mystery as to why this woman, with her very obvious background, would be in an isolated rural community such as Lakeview. She claims to have been in the area for approximately a month, and on the expressed reason of being there for rest and solitude, which of course she could find in abundance in that area. It was claimed by all three persons that the meeting at the bar at Hunter’s Motel just prior to the accident was the first time these three people had become acquainted.

“There is every indication that this was the type of case that immediate settlement should be attempted before this claimant got back to her home environment and under the more direct influence of her well-wishers and friends. This situation was recognized by Mr. Houston and Mr. Irby and they had set the stage for this treatment of the case. Apparently Mrs. [167] Chipman’s mother had been to Lakeview, expecting to pick up Mrs. Chipman and drive her back to Los Angeles, but the doctor advised against such a long automobile trip, and so the mother had left without the daughter. I didn’t meet the woman, but it was reported that she was rather domineering, and obviously very anxious to get the daughter back under her control, and into the hands of some attorney so that the case would be prosecuted to the fullest extent.

“Some Jewish boy friend in Oakland had called Mrs. Chipman long distance and given her explicit instructions that she was not to sign any papers of any kind, and to leave her case open until she got back to Oakland. She apparently had arrangements made with this individual to stay at his home after she got into Oakland on her return from Lakeview. It is reported that this individual’s name was Izzy Cantrovich. I am satisfied that this situation existed because Mrs. Chipman confided in me after the settlement was *completely* that this man had called her and told her these things, and that also one or two girl friends had called her up to congratulate her on the fine position she had attained, and to speculate with her as to how much money she could collect.

“Mr. Houston had expected that I would arrive with a large amount of cash so that a settlement could be consummated immediately, and a tender of actual cash made rather than a draft or a promise of a settlement draft. I was not prepared [168] to handle the case in this manner. Mr. Houston then got busy and wrote personal checks securing all the available cash he could dig up in Lakeview at that hour of the night. He finally came up with \$800 in currency.

“After being armed with this currency, the writer and Mr. Houston then called on Mrs. Chipman where she was confined to her room. This was approximately 11:30 P.M. It was my impression after visiting with the woman for a few minutes that she was somewhat overawed, confused and apprehen-

sive. I felt under the circumstances a soft approach would be more effective, and every attempt was made to visit with her and gain her confidence. Mr. Houston felt it would take \$1200 to settle the claim, based on the fact that the doctor had told her she couldn't work for two months, and he had computed eight weeks' loss of wages at \$150 a week to arrive at this \$1200 figure. I gained the impression that he perhaps had, through his previous contacts with the lady, intimated in some way that she would receive that amount of money in settlement, exclusive of her hospital expense. I secured the attached signed statement from her before talking settlement. After some discussion we were able to secure her signature to the attached release for \$1,050. This is based on \$1,000 to cover loss of wages, plus \$50 for the transportation expense to get back to Los Angeles.

"I turned over the \$800 in currency, and I gave her my personal check for \$250. I corrected the release form to [169] indicate that the consideration was in cash and check.

"I read the release form aloud to her, and very forcefully and explicitly informed her that in signing it she was releasing all right to bring any further claim against Mr. Houston or the New Zealand Insurance Company, and I feel there can be no doubt in her mind but what she had signed a full and final release. She has written at the bottom of the release form the fact that she has read this release of all claims.

"We brought in Mr. Ed Hill, proprietor of

Hunter's Motel, to witness her signature, and I have acknowledged it as a notary public.

"We have a rather complex situation here in that the statement secured from Mrs. Chipman completely exonerates Mr. Houston, and would seem to indicate there is no basis for substantiating any claim under the death law for California.

"Mrs. Chipman's attitude at the time of our contact was one of complete understanding and cooperation. She expressed many times she had no desire or intention of making any trouble for Mr. Houston. On the other hand, we had a young lady whose whole background and appearance suggested a person of loose morals, and whose attitude toward employment and the opposite sex was most definitely unconventional. The contacts from her circle of friends and natural environment indicated that after she returned to her home she would be subject to unusual pressure to attempt to capitalize on this accident. This lady is somewhat [170] childlike in her mental processes, and degree of intelligence, and there is a very good chance that her attitude could be changed by this influence and pressure from her wellwisher friends. We felt that in view of all these circumstances involved that it would be better to have a release executed by her immediately.

"There will be a guest medical claim to be presented later as soon as the medical bills can be accumulated. We requested the medical report and billing from Dr. Wilbur, and Mrs. Chipman has been instructed to notify us if she seeks additional

medical attention. She undoubtedly will consult another doctor after returning to Oakland or Los Angeles. She is at present wearing a heavy cloth support around her chest, and is complaining and discomfort in her low back region.

"I brought her in my car back to Klamath Falls and arranged here for her to get reservations on the 6 p.m. flight on United Airlines to Oakland. She left here on October 21st. My personal check was cashed for her in Klamath Falls.

"Mr. Houston and Mr. Irby are returning to San Francisco on October 23, and at the time they will contact your office through Mr. Paul Youngers, and arrange to give their statements on the accident.

"I personally checked the involved vehicle at Glos Motor Company in Lakeview and find it to be a 1951 grey colored Cadillac 4-door sedan, carrying motor No. 61-60-75329, California [171] license No. 2B32406, and showing speedometer reading of 46,522 miles. This vehicle shows considerable damage to the turret top. It is quite badly kinked and dented, and it would appear to me that in all probability the car upset.

"Mr. Houston suffered bruises and hematomas on his legs and back, and secured medical attention from Dr. Wilbur. I solicited medical reports from Dr. Wilbur, and the amount of his treatment for Mr. Houston, and these papers will be sent on to you so that any claim Mr. Houston has under guest medical coverage can be consummated.

"As soon as my personal check clears the bank I can send it to you for the completion of your

file. In the meantime it would be very helpful to me if I could be reimbursed as quickly as possible for the expenditure of this money. It is my understanding, Mr. Houston through Mr. Youngers, will arrange with your office for reimbursement of the money he accumulated by issuance of his own personal checks to provide the currency for the settlement in the sum of \$800.

"There will be little further work that I can do in the handling of this matter. As soon as I receive the medical reports and bills from Dr. Wilbur I will send them on, and this would seem to be the extent of my further activity on the case. I am therefore submitting at this time my service bill for your consideration. Signed J. W. Van Doren".

The Court: I should like to ask you, for the purpose of the record, to indicate the purpose of this offer.

Mr. Clausen: It is, Your Honor, in connection with the testimony by Mr. Youngers, the testimony by the additional witness Miss Wilkerson that will be offered in the deposition that I am going to offer following the completion of this offer here.

The Court: I don't follow you clearly. I don't follow you.

Mr. Clausen: It indicates, Your Honor—the offer is made also preliminary to the receipt of the further letter from the same Chipman person that Mr. Angell stated this morning would be produced through this attorney. The additional letter, Your Honor, showed—rather, the additional testimony of Mr. Youngers was to the effect that following the

accident a claim or demand letter was made by this party Chipman, which letter I have not seen, Your Honor, so this, Your Honor——

Mr. Angell: For the record, I object to the statement of counsel. It is a misstatement of any testimony of any witness in this case, and there is no testimony of any witness in this case that there was any further demand made on Mrs. Chipman's part.

Mr. Clausen: It is my recollection yesterday that Mr. Youngers—Your Honor is asking me the purpose of the offer, and the purpose of the offer, Your Honor, is to connect [173] the chain. Mr. Youngers yesterday, according to my recollection, testified that some 30, 40 days after the accident that this woman wrote a letter into Mr. Houston and that Mr. Houston showed it to Mr. Youngers and that Mr. Youngers suggested that this be turned over to some other person.

The Court: Well, so that no one is mislead in this case, I will entertain a motion to strike this document from the record.

Mr. Angell: I make it at this time, and move to strike. From the record on the ground it is incompetent, irrelevant, immaterial, that it does not bear upon any issue in this case, that it is hearsay as to Mr. Houston and the plaintiff in this case, and the statements in there are wholly self-serving declarations and not binding in any way upon the plaintiff or upon Mr. Houston and it is not shown—it is positively to the contrary that Mr. Houston did not see this report or did he ever have any

conversation with any one about the report after the things was or at the time of being prepared.

Mr. Clausen: In answer to that, Your Honor, since Your Honor has invited the motion, I would anticipate the granting of the motion, but——

The Court: I purposely granted it so that you are not mislead.

Mr. Clausen: May I, Your Honor, renew my offer then when the letter is produced by Mr. Angell that Mrs. Chipman—— [174]

The Court: I don't follow you.

Mr. Clausen: I wish to adhere to the Court's ruling, if the court should grant this motion.

The Court: I purposely granted it.

Mr. Clausen: All right, your Honor. Then I will renew the offer when the letter is produced that Mr. Angell has.

The Court: Very well.

Mr. Clausen: At this time, your Honor, we offer in evidence the deposition to which I have just referred now of Wilkerson and may I follow the same form, your Honor—rather I will follow the same form that your Honor observed, yesterday of putting my son on the stand to read the answers and I will read the questions.

The Court: Very well. We will take a recess now.

(Recess taken.)

Mr. Angell: If your Honor, please, there is sitting at the counsel table here, the young lady on my right here, is my daughter, Miss Tommy Angell. She is a member of this Bar and she is with us. I just want the record to show that.

Mr. Clausen: Your Honor, this is the deposition of Virginia Wilkerson, taken on October 26, 1955, and I will omit the title of the case and so forth, and it starts in:

VIRGINIA WILKERSON

"Be it remembered that pursuant to stipulation by the counsel for the respective parties, and on October 26, 1955, closing at the hour of 2:00 p.m. thereof at the Lake County [175] Courtroom, County Courthouse, Lakeview, Oregon, before me, Dorothy Julier, a notary public in and for the County of Lake, State of Oregon, personally appeared Virginia Wilkerson called as a witness by the Defendant, the Canada Life Assurance Company, who, being by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth."

The same appearances, same stipulations as on the deposition I read yesterday of June Pearson, and, with the court's permission, I will omit them here.

"Examination by Henry C. Clausen, Jr.

"Q. Your name is what?

"A. Virginia Wilkerson.

"Q. And where do you reside?

"A. In Lakeview.

"Q. Were you acquainted with one William Houston? "A. Yes.

"Q. How long had you known him?

"A. About 10 years.

"Q. Where did you first meet him?

"A. At my father's home in Lakeview.

(Deposition of Virginia Wilkerson.)

“Q. Would you describe yourself as a close friend of Mr. Houston’s? “A. Yes.

“Q. You are aware of the suit now pending in which you [176] are giving testimony, in which Mrs. Charlotte Houston is suing the Canada Life Assurance Company, the Assurance Company raising the defense of suicide—one of the defenses. Do you consider yourself hostile to that defense?

“A. Yes.

“Q. How often would you see Mr. Houston over this period of 10 years?

“A. Probably four or five times a year.

“Q. Would that be in the spring and fall, or when, approximately?

“A. Oh, in the spring and in the fall, sometimes in the summer.

“Q. Was Mr. Houston ever a house guest of you and your husband? “A. Yes.

“Q. How often?

“A. Every time he came down.

“Q. Would Mr. Houston come alone?

“A. No.

“Q. Was he always accompanied by Mrs. Houston? “A. No.

“Q. In other words, he would sometimes come up alone and sometimes bring Mrs. Houston with him, is that correct? [177]

“A. Correct.

“Q. Have you ever visited Mr. Houston in San Francisco or Berkeley? “A. No.

“Q. You were never in San Francisco?

(Deposition of Virginia Wilkerson.)

“A. I have never been to his home. I have been to his office, but never to his home.

“Q. On these occasions when Mr. Houston was present here in Lakeview at your home, would you have anything of an alcoholic nature to drink?

“A. Yes.

“Q. And when during the day would he begin to have these drinks? “A. No set time.

“Q. Would they sometimes begin in the morning?

“A. I have seen him have a drink in the morning.

“Q. And would he on those occasions continue drinking throughout the day?

“A. I would say yes.

“Q. Did Mr. Houston have a nickname?

“A. Yes.

“Q. What was the nickname?

“A. ‘Wild Bill.’

“Q. Wasn’t there a suffix on that?

“A. You mean the ‘Hiccup?’ [178]

“Q. ‘Wild Bill Hiccup’ was his nickname, is that correct? “A. Yes.

“Q. Did Mr. Houston drink more when he was up here along than when he was here with his wife?

“A. I don’t know.

“Q. When Mrs. Houston accompanied him to Lakeview, did they both stay at your house?

“A. No.

“Q. They did not? “A. No.

“Q. Would you describe Mr. Houston as a hypochondriac?

(Deposition of Virginia Wilkerson.)

"A. He took a lot of pills.

"Q. And was he constantly urging other people to do the same?

"A. He always had a cure for everything.

"Q. What was his cure for ulcers?

"A. I don't know—little pills.

"Q. What did Mr. Houston drink normally when he was up here? "A. Scotch.

"Q. And did he use any mix of any kind?

"A. Water, I believe.

"Q. Did he ever mix Scotch with milk? [179]

"A. Yes.

"Q. Did he tell you why he did drink such a drink?" "A. Joking, yes.

"Q. What did he say?

"A. 'The Scotch is for me, and the milk is for my ulcer'.

"Q. Would you describe Mr. Houston as being extremely egotistical?

"A. Not extremely.

"Q. You would describe him as being egotistical? "A. Yes.

"Q. Would he monopolize conversations?

"A. Yes.

Q. Would he become more egotistical and monopolize conversations more after he had drinks of alcohol? "A. No.

"Q. Did Mr. Houston ever shoot the ear off a stuffed deer in your father's office?

"A. I don't know whether it was its ear or not, but he did fire a gun once in his office.

(Deposition of Virginia Wilkerson.)

“Q. And had he had anything to drink on that occasion?
“A. I don’t know.

“Mr. Cooper: Were you present?

“A. Yes.

“Mr. Clausen: You don’t know? [180]

“A. No.

“Q. You were present when Mr. and Mrs. Houston were here together, were you not?

“A. Yes.

“Q. And on those occasions did you observe a change in Mr. Houston’s demeanor than when he was here by himself?

“A. Yes—a lot quieter.

“Q. And on those occasions when they both were up here, did Mr. Houston have as much to drink as when he was up here alone?
“A. No.

“Q. How many drinks did he normally have when Mrs. Houston was there?

“A. I wouldn’t know.

“Q. You don’t know, did you say?

“A. (Nods head)

“Q. Did you ever see him have anything to drink when Mrs. Houston was here?

“A. Yes.

“Q. And when was that, by the way? When was it that you saw him have drinks with Mrs. Houston?

“A. Whenever we went over to their cabin to visit them, he would offer us a drink.

“Q. In other words, it was on a number of occasions? [181]
“A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. On those occasions how much did Mr. Houston have to drink?

“A. Oh, several cocktails.

“Q. When he was up here by himself on the occasions when you saw him drinking, how much did he have to drink then, as a general rule?

“A. That I couldn't say.

“Q. Well, would it be more than four highballs? “A. I would say so, yes.

“Q. More than eight highballs?

“A. I couldn't say. I wasn't with him all the time.

“Q. Approximately, how many would you say?

“A. Approximately eight.

“Q. Have you ever seen him have more than eight highballs? “A. No.

“Q. You testified you visited Mr. Houston in his office, was it? “A. Yes.

“Q. Did you notice any change in demeanor between his demeanor in San Francisco and his demeanor here in Lakeview? “A. Yes.

“Q. What was the difference? [182]

“A. Here he was ‘Wild Bill,’ and there he was the manager for the New Zealand Insurance Company.

“Q. In other words, he was reserved and refined in San Francisco, is that correct?

“A. Correct.

“Q. What did Mr. Houston normally dress in here in Lakeview?

“A. Cowboy boots, jeans, and cowboy hat.

“Q. Would you describe this difference in de-

(Deposition of Virginia Wilkerson.)

meanor here in Lakeview and in San Francisco as a 'Jekyll and Hyde' transformation? Is that an apt description? "A. Yes.

"Q. Did Mr. Houston's dress appear unusual here in Lakeview? "A. No.

"Q. Was it unusual for people of his occupation and standard of living to dress as he did?

"A. No.

"Q. Did Mr. Houston suffer an automobile accident in the month of October, 1953?

"A. Yes.

"Q. Who was present in the car with him?

"A. I don't know.

"Q. You don't know? Did Mr. Houston ever discuss with you that accident? [183]

"A. Yes.

"Q. Did he tell you who was with him?

"A. He told me three different stories.

"Q. Tell us those stories.

"A. One was that he was alone; one is that he was with Mr. Irby and a girl; and one is that he was just with the girl.

"Q. And what was the profession of this girl?

"A. Prostitute.

"Q. What color hair did she have?

"A. Purple.

"Q. Following this accident, did Mr. Houston ask to borrow money from you? "A. No.

"Q. Did he ask to borrow money from your father? "A. No.

"Q. Or your brother? "A. No.

(Deposition of Virginia Wilkerson.)

"Q. When was the first time you *say* Mr. Houston following this accident?

"A. Oh, the evening after the accident.

"Q. And was this girl present also when you saw him? "A. Yes.

"Q. Who else was present when you saw him?

"A. Mr. Van Doren, Mr. Hill and Mrs. Hill and [184] Mr. Irby.

"Q. Is that all? "A. That's all.

"Q. Was Gordon Long present?

"A. No.

"Q. Where was this that you saw him?

"A. Hunter's Lodge.

"Q. And that is a cocktail lounge, is it not?

"A. Yes. But the girl wasn't in the cocktail lounge.

"Q. Where was the girl?

"A. In one of the rooms.

"Q. What was Mr. Houston doing that evening? Was he drinking?

"A. He had had a drink.

"Q. Now, did you observe this girl make a phone call? "A. No.

"Q. Did you observe Mr. Houston hand her any money? "A. No.

"Q. Did Mr. Houston tell you that he had handed her some money? "A. Yes.

"Q. How much?

"A. A thousand dollars.

"Q. Would you describe Mr. Houston as being a selfish person? [185] "A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. And what do you base that statement on?

“A. Well, he wasn’t considerate of other people, let’s put it that way.

“Q. Can you give us an instance, an example?

“A. Oh, wearing his boots in the house with mud on them.

“Q. Against your objections, is that correct?

“A. Yes.

“Q. Can you give us another example?

“A. (Hesitates) Oh, dropping us off at 5:00 and saying he would be back at noon and not showing up until 5:00 at night.

“Q. Would you say that Mr. Houston liked a roaring good time? “A. Yes.

“Q. Let me ask you this, Mrs. Wilkerson—would you say that Mr. Houston when he was up here without his wife would be under the influence of alcohol a great deal of the time?

“A. Yes.

“Mr. Clausen: That is all.

Mr. Clausen: Then there is cross-examination by Mr. Cooper, Mr. Cooper being the local attorney at Lakeview, Oregon, who took the deposition for the plaintiff in this [186] matter or appeared in it.

“By Mr. Cooper:

“Q. You say, Mrs. Wilkerson, that you knew this man for a period of about 10 years. I wish you would enlarge on that answer and give the record the nature of that acquaintance.

“A. Well, he came as a friend of my father’s, and in a period of 10 years he was up probably

(Deposition of Virginia Wilkerson.)

four or five times a year and always came to our house or stayed at our house.

“Q. Now, what business is your father engaged in in the community? “A. Real estate.

“Q. Does he handle insurance?

“A. Yes.

“Q. Did he handle the New Zealand line that Mr. Houston has or not, do you know?

“A. I don't know.

“Q. Over this 10-year period has your family maintained sort of a hunting and fishing lodge west of Lakeview called Sprague River?

“A. Yes.

“Q. How many miles is that?

“A. Forty.

“Q. Did Mr. Houston have a place nearby?

“A. Yes. [187]

“Q. Did you ever see Mr. Houston bring his wife to that spot of his out there? “A. Yes.

“Q. How far apart were the two?

“A. About a mile.

“Q. His place wasn't very—what you would call ‘pretentious,’ was it? “A. No.

“Q. Do you know whether or not there were any members of the Houston family besides Mr. Houston and his wife? “A. Two girls.

“Q. How old were they, going back to the first time you saw them? How old would you say they were? “A. About 18 and 21.

“Q. About how many years ago, would you say, prior to 1953?

(Deposition of Virginia Wilkerson.)

“A. I don’t remember exactly when the girls started coming up. Chuckie was 21 and Ann 18 when they started coming up.

“Q. Just approximately, how many years ago was that, this being 1955, that you first saw the daughters up here?

“A. About five years ago.

“Q. And most of the testimony this morning revolved around him in 1953. That would be about 1951, would you say? [188]

“A. Let’s see. Yes, I would say it was about 1950 or 1951.

“Q. Where did Mrs. Houston and the daughters sleep or live when they came up here?

“A. At the cabin.

“Q. Out on Sprague River, that you referred to? “A. Yes.

“Q. Didn’t stay in your home, I understand?

“A. No.

“Q. Where did Mr. Houston stay at that time, do you know?

“A. At the cabin with them.

“Q. About how long would the wife stay on those visits, if you know?

“A. Sometimes two weeks.

“Q. And the daughters?

“A. Yes, they all came together.

“Q. Would the daughters and the mother leave together, or would one or the other outstay the other?

“A. They usually left together.

(Deposition of Virginia Wilkerson.)

“Q. Did the women folk in the family hunt and fish?

“A. Yes. They liked to fish.

“Q. Did you ever fish with them?

“A. No.

“Q. Did Mr. Houston fish with them, do you know? [189] “A. Yes. He did.

“Q. Now, turning to the answer which the Defendant has filed in this case, Mrs. Wilkerson, I am reading from Paragraph II of the First Affirmative Defense—the statement is made by the Insurance Company that Mr. Houston represented at the time he applied for the policy that he was a social, or occasional drinker.

“Mr. Clausen: Just a moment. That isn't the representation there. May I see it first?

“Mr. Cooper: I am referring to line 5.

“Mr. Clausen: I think it would be better if you read the allegation itself.

“Mr. Cooper: All right. I will read from Paragraph II on lines 4, 5, and 6. These are representations which the Insurance Company said Mr. Houston made when he applied for a policy, to wit: ‘That the said William Mark Houston used alcoholic stimulants only “socially” and only “occasionally”, and never used alcoholic stimulants to excess.’ Take any one of the years of your acquaintanceship with Mr. Houston. As I understand your testimony, you know nothing about what he did at the San Francisco or Berkeley end of the line, is that true? “A. True.

(Deposition of Virginia Wilkerson.)

“Q. And all you saw or observed was what happened [190] up here in Lakeview?

“A. True.

“Q. And what per cent of the year that you saw him at Lakeview did that consist?

“A. Not more than four or five times a year.

“Q. And that would be scattered over, I assume, several months? “A. (Nods head)

“Q. You mentioned fishing. Was he a man that liked to fish? “A. Yes.

“Q. Generally speaking, when is the fishing season open in this part of Oregon?

“A. Oh, May.

“Q. Around May?

“A. I believe so.

“Q. And continues on through the summer?

“A. Yes.

“Q. Now, we have a little different deer season than California, do we not; by that I mean the time of the year. “A. I don't know.

“Q. You don't know that? “A. No.

“Q. This year, when did the deer season open in [191] Oregon, do you know that?

“A. I can't remember the exact date.

“Q. Did you go hunting this year?

“A. Yes.

“Q. When did you go hunting this year?

“A. I didn't go until the second—I believe it opened on a Saturday and I went on a Sunday.

“Q. What month would that be?

“A. That would be in October.

(Deposition of Virginia Wilkerson.)

“Q. Going back to 1953, were you on any hunting party with Mr. Houston—in the fall of 1953? By hunting I mean deer hunting? “A. Yes.

“Q. What time of the year was that?

“A. October.

“Q. Can you give us the season of 1953 for ducks and geese in relation to the deer hunting season?

“A. They follow one another.

“Q. Which follows which?

“A. The duck follows the deer.

“Q. So that would be after October?

“A. It would be in the middle of October.

“Q. And then extending on so long as the season happened to be? “A. Yes. [192]

“Q. Were you on any duck hunting or goose hunting parties with Mr. Houston or other parties in 1953 here at Lakeview? “A. Yes.

“Q. To the best of your memory, when was the last time, approximately, that you saw Mr. Houston in 1953 here at Lakeview?

“A. Probably at the end of the duck season.

“Q. The government changes the season every year. Could you give us a fairly good date for that in relation to, say, take Thanksgiving or Christmas?

“A. I would say it was the middle of November—that was the last time I saw him here.

“Q. You would put it, then, just a few days before Thanksgiving? “A. Yes.

“Q. The last time you saw him in Lakeview?

“A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. Coming back to the quotation I read from the Defendant’s answer a while ago, would you classify Mr. Houston, from what you saw him, as a ‘social’ drinker—from your own personal knowledge, not from what anybody else says about him?”

Mr. Clausen: To that, Your Honor, we object on the ground it calls for the conclusion and opinion of [193] the witness as to a fact and also as to the law whether the witness would classify Mr. Houston as a “social” drinker.

Mr. Angell: There is no objection to the question, to the form of the question, was not at the time.

Mr. Clausen: The objections are reserved.

Mr. Angell: Well, save and except as to the form of the question. The objection was not reserved. If you had any objection to her answer in this, I think you should have stated, so Mr. Cooper could reframe it.

Mr. Clausen: No, I am objecting not to the form, to the substance. I am addressing myself to what you pointed out yesterday when you asked me to follow this procedure of having my son read this for the reason that you could make objections. My objection is, Your Honor, that this particular answer is incompetent, irrelevant and immaterial in that it would be the conclusion of the witness. The question is this, he refers to the quotation in the Answer and then he asks the witness whether the witness would classify Mr. Houston as the kind of a drinker embraced within the allegations in the

(Deposition of Virginia Wilkerson.)

Answer. Now, I say that calls for the opinion and conclusion of the witness.

The Court: Submitted?

Mr. Angell: Beg pardon?

The Court: Is the matter submitted?

Mr. Angell: Yes. [194]

The Court: The objection will be sustained.

Mr. Clausen: The same for the next question.

Mr. Angell: Now (Reading deposition).

“Q. Now, about ‘occasionally’—would you say whether he was an ‘occasional’ drinker or otherwise?

Mr. Clausen: The same objection, Your Honor; there again, the use of the word “occasionally” there, that is put in quotes just as in the prior question, the prior question to which I objected where the word “social” was put in quotes. The same objection, refers to the allegation in the Answer, and the witness is being interrogated as a matter of conclusion as to whether the man falls within a category embraced within an allegation of the Answer.

Mr. Angell: My understanding is that when you ask a question of a witness and calling for the conclusion, that that objection is made because that is the form of the question, namely, that it calls for the conclusion of the witness, and if your objection had been made at that time it would have allowed Mr. Cooper to then go down and try to piece by piece take out just how much she saw of her own of Mr. Houston’s drinking.

(Deposition of Virginia Wilkerson.)

The Court: The same ruling. Let us proceed.

Mr. Angell: (Reading)

“Q. Going back to the hunting trips, just explain who would go. Would your father go, usually?

“A. Yes.

“Q. And yourself? “A. Yes.

“Q. I am talking about the trips Mr. Houston went on. “A. Yes.

“Q. How many hours would they last, as a matter of duration?

“A. Well, usually all day.

“Q. You would go out early in the morning and not get back until after shooting time at night. And that could be quite a few hours, could it not?

“A. Yes.

“Q. Did you ever see drinks served on those hunting parties? “A. Yes.

“Q. Did you ever see Mr. Houston take one?

“A. Yes.

“Q. Did you take one? “A. Yes.

“Q. Your father? “A. Yes.

“Q. The rest of them in the party?

“A. Uh huh.

“Q. Now, then, bringing Mr. Houston in from the [196] streams and the fields do you know whether or not, or would you say whether or not he attended many inside events here in town? By that I mean dinner parties in homes, or would he ever go to a public dance or private dance here that you know of, or not?

“A. Yes. Several homes.

(Deposition of Virginia Wilkerson.)

“Q. Did he ever come to your house for meals?

“A. Yes.

“Q. To the Longs?

“A. He has several friends around.

“Q. Did you ever see him at any public gathering?
“A. Yes.

“Q. By that I would mean a show or a—

“A. (Interrupting) At the bull sale, parties and things like that.

“Q. Bull sale—that is an annual sale of livestock in the community, is it not?

“A. Yes.

“Q. Did you ever ride with him in an automobile to and from hunting parties, or to and from social events outside of your home?

“A. Yes.

“Q. Did you feel yourself safe with him at the wheel?
“A. He was pretty fast.

“Q. A fast driver? [197] “A. Yes.

“Q. Did you feel yourself safe from the standpoint of the amount of liquor he may or may not have consumed?

Mr. Clausen: Just a moment. Your Honor, we will again object on the ground that the answer shows the conclusion or opinion of the witness and is objectionable from that standpoint: “Did you feel yourself safe from the standpoint of the amount of liquor he may or may not have consumed?”

The Court: It will be sustained.

Mr. Angell: (Reading)

(Deposition of Virginia Wilkerson.)

“Q. Did you ever have a car accident with him?

“A. No.

“Q. This is a rather general question, I know. It is probably difficult for you to frame an answer, but I wish you would do it as best you could. Going back over the 10 years of acquaintanceship with Mr. Houston, and the times you were in automobiles with him that he drove, going to and from hunting and bull sales, or anything else the two families may have participated with him in, about how many miles would you say you had ridden around this county, that Mr. Houston was at the driver's wheel? Just do the best you can.

“A. I would say approximately 200.

“Q. How far is it out to your lodge, the fishing lodge? [198]

“A. Forty.

“Q. And back is forty, is it not?

“A. (Nods head)

“Q. Would you say you made ten trips out and back when he was the driver?

“A. I don't believe I ever drove out to the cabin with Mr. Houston.

“Q. Have you taken trips when your father was the driver and you and him the passengers?

“A. Yes.

“Q. There has been some testimony here regarding a community named Plush. That is east of here, is it not?

“A. Yes.

“Q. About how many miles east of here?

“A. About 40.

“Q. That is in Warner Valley, is it not?

(Deposition of Virginia Wilkerson.)

"A. Yes.

"Q. Did you ever go to Plush with your father, Mr. Houston and possibly others to hunt?

"A. Yes.

"Q. You went there for ducks and geese, did you not? "A. Yes.

"Q. Did you ever ride in a car where he was the driver? [199] "A. Yes.

"Q. How many trips would you say that you were a passenger and he was the driver?

"A. Only one.

"Q. One to Warner? "A. Yes.

"Q. What year was that in relation to 1953?

"A. 1953.

"Q. Can you tell us who else was present on that particular trip?

"A. Allen Greenwood and Mr. Irby and Mr. Long.

"Q. This Mr. Long? We have several Mr. Longs.

"A. Gordon Long.

"Q. Now there was some reference here a while ago in the questions asked by Mr. Clausen regarding Mr. Houston's remedies for various things, and I think Mr. Clausen mentioned ulcers. Does your father have ulcers? "A. Yes.

"Q. How many years has he been bothered with ulcers, would you say?

"A. Ever since I can remember.

"Q. And you are upwards of 20 years of age, are you not? "A. Yes. [200]

"Q. You said a while ago that you were fairly

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certain that you had seen occasions when Mr. Houston had had perhaps as many as eight highballs. Isn't that about what you said?

"A. Yes.

"Q. Now, going back to any one of those occasions or all of them, if there is more than one—take them up as you remember them. How many hours over a period of time would such a situation exist?

"A. We would come in and have cocktails after hunting, about sundown.

"Q. About sundown—and have dinner, then usually stay at Hunter's Lodge?

"A. We usually ate there or at home, either one, usually around 12 at night.

"Q. And what I am trying to find out is whether or not the occasions you would refer to when you answered Mr. Clausen's question or questions just such as you described—now possibly a drink at sundown and maybe one before dinner or at dinner, and on into the evening? "A. Yes.

"Q. About how many hours would that be?

"A. Oh, I would say from 6 until 12.

"Q. In other words, it would be about a 6-hour period? [201] "A. Yes.

"Q. If he had 6 of them, that would be one an hour, would it not? "A. Yes.

"Q. Now, Mr. Clausen asked you whether or not you felt the man had a 'Jekyll and Hyde' personality, and you said you thought he did. What do you mean by that?

(Deposition of Virginia Wilkerson.)

“A. He was a completely different person in San Francisco than he was up here.

“Q. In San Francisco, as I understand your testimony, and all you are testifying to is your personal knowledge, the times you saw him there was in his office? “A. Yes.

“Q. He was in the insurance business, was he not? “A. Yes.

“Q. We can all agree to that. And where was his office related in relation to the business center of San Francisco?

“A. Montgomery Street.

“Q. Down the center of town?

“A. Yes.

“Q. How many times did you visit him in his office? “A. Just once. [202]

“Q. Can you give us the year in which you paid that visit?

“A. It was 1954. It was just at the time of the East-West Game. That would be 1954.

“Q. You remember it in January, 1954?

“A. Yes.

“Q. It is alleged in the complaint and admitted in the Answer that he died on February 22, 1954, so it would be just the month preceding his death?

“A. (Nods head)

“Q. Who else was present at the time of that visit? “A. My father.

“Q. How long did you stay at his office?

“A. Possibly half an hour.

“Q. What did you folks talk about?

(Deposition of Virginia Wilkerson.)

“A. Hunting, and the ranch that he was interested in here.

“Q. You mean he had a financial interest up here? “A. Yes.

“Q. Recalling as best you can his conversation upon that occasion, were his remarks rational?

“A. Yes.

“Q. Were his remarks relating to his ranch investment out here? [203] “A. Yes.

“Q. Just tell us what he said about the ranch, if you can recall.

“A. Well, he wanted to raise purebred cattle, and dad was trying to get hold of cattle for him to put on his ranch.

“Q. Was your father a joint owner with him at the ranch? “A. Yes.

“Q. How long has your father been in business here in Lakeview, approximately? Give us the years. “A. Fifty.

“Q. Fifty years? “A. (Nods head)

“Q. Did your father agree or disagree that the placing of good stock on the ranch was a good move, or not?

“A. He thought it was a good idea.

“Q. Mr. Houston thought it was, too?

“A. Yes.

“Q. They talked about getting livestock to put on the ranch? “A. Yes.

“Q. Now, then, coming to the portion of the conversation that related to hunting—what did

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[204] Mr. Houston say about that subject, if you can recall?

"A. Just what a good time he had and the bag limit he got.

"Q. His conversation—was it restricted to past hunts or future hunts? "A. Both.

"Q. You said a minute ago he said something about what kind of limits—how good the hunting had been, and things like that?

"A. Yes.

"Q. Did he have reference to the preceding fall?

"A. Yes. They were plaining grain so they could make it good hunting down on the ranch.

"Q. I wish you would repeat that answer. They were talking about grain? "A. Yes.

"Q. Tell us again what you said.

"A. They were talking about the grain and where they planted it, so they could—

"Q. (Interrupting) The grain was in the ground, as I understand your testimony, when this conversation took place in Mr. Houston's office?

"A. Yes.

"Q. And they planted the grain expecting a visit from the ducks and geese? [205]

"A. Yes.

"Q. When the crop came up, is that right?

"A. Yes.

"Q. And that would be the 1954 crop, would it not? "A. Yes.

"Q. Now, you testified a while ago that in talking hunting, Mr. Houston was talking about the

(Deposition of Virginia Wilkerson.)

past, and was talking about the future. By the future you mean his remarks about the grain crop and the availability of feed for the 1954 duck and goose flight? "A. Yes.

"Q. Did he make any other reference to hunting?

"A. Stocking the pond with fish.

"Q. Where is this pond located, do you know?

"A. I think they were referring not to a pond, but the river between the two cabins.

"Q. Now, going back to 1953, and the years prior thereto, was it the customary practice for anyone, including the State of Oregon, to plant fish in that Sprague River that runs down by the cabins? "A. Yes.

"Q. Now, for the benefit of this record, this Sprague River is by these cabins about forty miles west of Lakeview? "A. Yes. [206]

"Q. What direction does Sprague River run?

"A. West.

"Q. Comes out of what direction?

"A. East.

"Q. And you mentioned a while ago that your father had a cabin out there. Is that right?

"A. That's right.

"Q. Situated near or far away from the stream?

"A. Near.

"Q. How far away and what direction was the cabin of Mr. Houston?

"A. About a mile east.

"Q. Up the stream? "A. Yes.

(Deposition of Virginia Wilkerson.)

"Q. Is that good fishing water between the two cabins? "A. Yes.

"Q. Coming back to the year 1953 and prior thereto, what was done by whom to plant or stock the stream with fish?

"A. They were planning to stock the fish between the two cabins.

"Q. I am talking about before that.

"A. They had stocked it once before.

"Q. Who are 'they'? [207]

"A. Mr. Houston and Mr. Utley, and I believe Mr. Wilkes was in on that, too.

"Q. Where did they obtain those fish, if you know? "A. I don't know.

"Q. Who brought them in and how?

"A. They brought them in in trucks.

"Q. Do you know whether or not they were State of Oregon fish, or a private supply?

"A. Private supply.

"Q. In about what year had they done that?

"A. About 1950.

"Q. As I recall your testimony before lunch, at the time you and your father visited the office of Mr. Houston in San Francisco in January, 1954, they talked of plans of restocking this Sprague River, is that right? "A. Right.

"Q. Just tell us what they said about it. That is the best way to bring it out, I think.

"A. They were talking about doing the same thing next year.

"Q. What did Mr. Houston say about it?

(Deposition of Virginia Wilkerson.)

"A. I can't remember their exact conversation or words.

"Q. What did they say in substance? [208]

"A. That the stream had been—a few of the holes had been dynamited and had killed quite a few fish, and they were going to restock it.

"Q. Do you mean Mr. Houston or your father dynamited it?

"A. No. Someone else.

"Q. Speaking now about Mr. Houston, did they talk about the cost of restocking the stream?

"A. I couldn't say.

"Q. Did they talk about sharing or dividing the cost between themselves or with others?

"A. Yes. With Mr. Wilkes.

"Q. This restocking was to be done in what year? "A. 1954.

"Q. This conversation took place in your presence in January, 1954, is that right?

"A. Yes. Or December just before.

"Q. You spoke about the East-West game?

"A. Yes.

"Q. Had you gone to the game?

"A. No. It was before the game.

"Q. Would you describe it as being in the Christmas holidays or New Year's holidays?

"A. Yes.

"Q. The fishing season started, I understood you [209] to say, generally speaking, the first of May? "A. Yes.

"Q. What was their planning regarding hav-

(Deposition of Virginia Wilkerson.)

ing the fish in the stream by the time the season opened?

“A. I don’t know about that.

“Q. They didn’t say?

“A. They didn’t say.

“Q. Do you recall any other subjects talked about in that visit that you and your father made to Mr. Houston’s office insofar as any business matters or activities were concerned?

“A. No. It was mostly social.

“Q. Now, this morning Mr. Clausen used the words ‘Jekyll and Hyde’ and asked your opinion as to whether you would fit them to Mr. Houston. Just what did you have in mind? Will you elaborate on the answer you gave him so we can have the record show exactly what you have reference to? Did you ever read the story about Jekyll and Hyde?

“A. Yes. His manner of dress and in being so very quiet down there and quite noisy up here.

“Q. As Mr. Clausen said at the beginning of the taking of the deposition of the gentleman who preceded you, and he may have said as much when we commenced taking your deposition—he stated the defenses in [210] this case. I will refresh your memory. Even though he may have done so, the first defense of the Insurance Company relates to certain alleged misrepresentations by Mr. Houston as to the nature and scope of his drinking appetite. The second answer admits that Mr. Houston died on February 22, 1954, but it goes on to say this,

(Deposition of Virginia Wilkerson.)

and I quote from Paragraph III of the Second Affirmative Defense: 'That the death of said William M. Houston on or about February 22, 1954 resulted from suicide.' Now, you say that Jekyll and Hyde expression you used was in reference to his manner of dress, etc.?

"A. (Nods head)

"Q. As I understand your testimony, you never saw him but once in his own home town, which was San Francisco, is that right?

"A. No. I have seen him several times, but that was the only time I went to his office.

"Q. Where else did you see him in San Francisco?

"A. In our hotel. Every time we went down we always went out somewhere.

"Q. In other words, the two families would grab a date together. Would his wife and daughter accompany him?

"A. No. Father has been down several times, but Charlotte has always been out of town when I was down there with my husband. [211]

"Q. So you and your husband, or father, and Mr. Houston would get together for a social hour or something? "A. Yes.

"Q. And what was the nature of his dress at that time?

"A. Very proper—business suit.

"Q. He wore a business suit at this visit to the office, as you recall? "A. Yes.

"Q. So as I understand your testimony, when

(Deposition of Virginia Wilkerson.)

you were referring to the descriptive words of 'Jekyll and Hyde' of Mr. Clausen, you were in no way referring to his mental condition?

"A. No.

"Q. Going back to that last fall when Mr. Houston was here, and I am talking about the fall of 1953—you testified that you were out on deer hunting parties that fall with him and you went out to Plush once to a duck hunt. Is that right?

"A. Yes.

"Q. Did you go on any other duck and goose hunting trips with him that fall? "A. Yes.

"Q. What valley or valleys were they taken to? [212]

"A. Right behind the house—the Bernard Ranch.

"Q. You have good shooting within a short distance of your home, do you not?

"A. Yes.

"Q. About how far from there?

"A. About a mile.

"Q. At the so-called Bernard Ranch?

"A. Yes.

"Q. Your father's firm has an interest in that ranch? "A. Yes.

"Q. It owns it, does it not?

"A. Yes.

"Q. Now, in the course of those associations with Mr. Houston in the fall months of 1953, at any time or any place here in Lake County did

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he and yourself and others who were present discuss, say, politics? "A. Yes.

"Q. Did Mr. Houston participate in those discussions? "A. Yes.

"Q. Were his remarks, viewpoints, and comments, in your opinion, rational regarding that subject? "A. Yes.

"Q. Now, in the course of the associations that you had with Mr. Houston and his hunting companions and [213] dinner companions during the fall of 1953, were such subjects as the stock and bond market or the stock market or investments discussed? "A. Yes.

"Q. And did Mr. Houston take a part in those discussions? "A. Yes.

"Q. And did he in the course of participating therein express his opinion as to the value or lack of value of different stocks and bonds that could be bought or were available, and in the course of his discussion did he give reasons why he thought a certain stock might be good or another one might be bad or doubtful?

"A. Yes. He discussed it like anyone would.

"Q. In the course of listening to his discussions of that subject, stock and bonds and the stock market, did you gain the impression that his remarks, his viewpoints and opinions were those of a rational person? "A. Yes.

"Q. Now, upon that same type of occasion, were public affairs,—by that I mean the national pic-

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ture, world affairs—did they enter into discussions from time to time? “A. Yes. [214]

“Q. Did Mr. Houston express himself upon these occasions as to such subjects?

“A. Yes.

“Q. And was his conversation and his opinions at that time on that subject rational, in your opinion? “A. Yes.

“Q. Now, you have testified that over the 10 years that you knew Mr. Houston that he was attracted to this community primarily because of hunting and fishing. Is that a correct statement to make? “A. Yes.

“Q. And I assume from that that it is reasonable to say that wildlife and wildlife problems interested him. Is that right? “A. Yes.

“Q. A fair statement to make?

“A. (Nods head)

“Q. In the course of your acquaintance with him over that 10-year period, did you ever hear him discuss his opinions as to our various species of wildlife and what should be done to improve their habitat, or what should be done to encourage them to multiply, or what might be done to protect them from predators, etc.? Did you ever hear him discuss those subjects? “A. Yes. [215]

“Q. Were his discussions upon that subject, in your opinion, rational? “A. Yes.

“Q. Now, going back to when you first met him, at the beginning of this 8, 9, or 10-year period and taking these subjects that I have enumerated here,

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and comparing his remarks of 8, 9, or 10 years ago with his remarks during the last several months that he was a visitor here in the Lakeview community, did you see any difference or any contrast as to the quality of his mental attitude toward thinking out and discussing these problems?

“A. Well, he was more enthused because he was acquiring property.

“Q. Acquiring property here? Enthused about the Lakeview community? “A. Yes.

“Q. Upon such subjects as wildlife, the stock market, or anything of that nature, was there anything in his discussions of the last few months you knew him that led you to be alarmed or suspicious of his mental outlook on life or on those subjects?

“A. (Shakes head)

“Q. Going back to one of the early questions that Mr. Clausen asked you here today, and I am referring to [216] the question relating to where he asked you as to whether or not you were hostile to this defense of suicide, you remember him asking you that question? You answered ‘yes’ to that question, did you not? “A. Yes.

“Q. I want you to elaborate and testify why you take that attitude to the claim that the man shot himself?”

Mr. Clausen: Your Honor, to that we object on the same ground as before. The question is referring to the allegations of the Answer and in this particular case the vice is even worse. Not only is the witness asked an opinion as to the allegations

(Deposition of Virginia Wilkerson.)

in the Answer but the witness here is asked to give an opinion as to why the former answer on that subject was given. In other words, it would be argumentative. The question was asked the witness why the answer was given, which itself is argumentative and is even going further than that, Your Honor. It is asking a reason why on a matter of opinion, so we object on that ground.

Mr. Angell: May I answer that? I think your objection would be good, Mr. Clausen, I do not think that either expert or lay testimony as to whether one thinks one committed suicide is a valid question. However, when anyone opens the door on this subject on direct examination, I think it is quite proper then for the other side to find out what they meant by it, and Mr. Clausen, in taking this deposition, [217] said:

“You are aware of the suit now pending, in which you are giving testimony, in which Mrs. Charlotte Houston is suing the Canada Life Assurance Company, the Assurance Company raising the defense of suicide, one of the defenses. Do you consider yourself hostile to that defense?”

The answer is “Yes.”

Now, here, Mr. Cooper is merely asking her what she meant when she said, “Yes” in answer to a question asked by counsel for the Canada Life. I submit on cross-examination one has the right to ask the witness what they meant by an answer they gave to a question asked by the counsel whose witness she was.

(Deposition of Virginia Wilkerson.)

Mr. Clausen: In answer to that, Your Honor, may I point out that the purpose of the question of my son in putting this to the witness was evidently because the witness was a long-time friend of the family and the decedent and the question was to establish the relationship, in other words, the witness was hostile to the defense or any defense from the relationship and, under Rule 43-B of this court, that having been established, we then can proceed in a different fashion, and that was the purpose of laying the foundation.

Now, here, the question he was asking says: "I want [218] you to elaborate and testify why you take that attitude to the claim that the man shot himself."

Well, Your Honor, I say that that is a wide-open door, it is calling for opinion and conclusion, it is asking for an opinion on the very fact that Your Honor is supposed to find.

The Court: The objection will be overruled. He may answer.

Mr. Angell: (Reading)

"Q. I want you to elaborate and testify why you take that attitude to the claim that the man shot himself.

"A. It is my own personal feeling that he didn't do it.

"Q. Do you base that feeling on this 10 years of acquaintanceship with the man?

"A. Yes"—

Mr. Clausen: Now, Your Honor, may I, without

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interrupting, to save the Court's time, have my objection run to this line of interrogation? I am speaking specifically of opinion evidence as to whether the man did or did not shoot himself deliberately.

The Court: What is the purpose of the offer?

Mr. Angell: The purpose of the offer is that the question is only following up on what Mr. Clausen himself opened up, Your Honor. [219] He says it was put in to show the lady was a ten-year friend of the Houstons. Well, of course, the simple way to do that is just to ask the lady whether she had been a friend of the Houstons for ten years. He didn't ask that. He asks the question whether she was hostile to the defense in this case of suicide and her answer says she was.

Now, then he says—well, on cross, "Would you say why you are hostile to it?" And she says: "My own personal feeling that he didn't do it."

Now, he then goes on: "Do you base that feeling on this ten years of acquaintanceship with the man?"

Now, it is all directed to why she answered that question on direct that way.

The Court: For that limited purpose, I will allow it. Let the record stand.

Mr. Clausen: Your Honor, may I just make this clear——

The Court: Yes.

Mr. Clausen: I want the record clear that, I didn't want your Honor to be misled by counsel,

(Deposition of Virginia Wilkerson.)

he has referred to "he asked" and "he asked." These questions here that he is asking were not asked by my son. These were asked by Mr. Angell's corresponding counsel there.

Mr. Angell: The question that I referred to as "he asked" was a question—was questions which your son as counsel for Canada Life asked this lady when he first started [220] out, and he said: "Do you consider yourself hostile to that defense?" Just before that he had stated that one of the defenses was the claim that Mr. Houston had committed suicide. The witness answered "Yes."

Now, as I said before, I do not take the position that this witness is qualified to testify whether Mr. Houston committed suicide or didn't or whether it was accidental or wasn't. All I am saying is that counsel for the defendant here, having opened up the subject to what her attitude was, not towards whether she was a friend or whether she was hostile—lots of friends are not hostile; they like to tell the truth whenever they are a witness—but she was asked whether she was hostile to the defense of suicide in this case.

Mr. Clausen: I know all that, Mr. Angell. The point I am making is to clarify and make very clear——

The Court: I can indicate to you now that I am limiting—your position that is calling for the opinion and conclusion of this witness, your legal position is correct—I have limited this testimony

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for the purpose of the offer, the explanation of testimony that has gone previously.

Mr. Clausen: All right. These questions on page 28 were not asked by my son and were asked by counsel for Mr. Angell.

The Court: Yes.

Mr. Angell: I think, Mr. Clausen, the point is this, that—— [221]

Mr. Clausen: The court has ruled. I am sitting down.

Mr. Angell: All right. Then we will go on:

“Q. Do you base that feeling on this ten years of acquaintanceship with the man?

“A. Yes.

“Q. Now, in response to another question by Mr. Clausen, you said in words or in substance that Mr. Houston was selfish, and you went on to say that he wasn't considerate of others. This is about what you said, was it not?

“A. Yes.

“Q. Would you care to qualify that answer by telling us whether or not in the use of the word 'selfish' you meant that he was selfish with his worldly goods?

“A. I don't understand the question.

“Q. When you said he was selfish, did you mean to imply that somebody might hit him up for a loan and be refused or somebody might want to borrow a car and be refused?

“A. No.

(Deposition of Virginia Wilkerson.)

“Q. Did you ever see Mr. Houston down here at the annual Rotary Club livestock auction?

“A. Yes.

“Q. Did you *ever him* make one or more purchases there?”

Mr. Angell: There is apparently a word omitted there.

“A. Yes.

“Q. And based upon your acquaintanceship in the community, [222] can you tell us briefly what the money is used for that is paid in there for purchases at the Rotary Junior livestock sale?

“A. To give the children a chance to raise stock and to forward agriculture.

“Q. And livestock raising?

“A. And livestock raising.

“Q. Isn't it true that the money paid in by purchases is paid on to the children as a reward for their efforts or their activities?

“A. Yes.

“Q. So when you say Mr. Houston was selfish, you weren't referring to an action of that kind?

“A. No.

“Q. You would say he was unselfish?

“A. Yes.

“Q. As I understand your testimony, you are restricting your use of the word to some personal habits of coming into the house as a guest and not cleaning the mud off his shoes, or something like that?

“A. Yes.

“Q. Now, these frequent hunting and fishing

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trips you say you and members of your family took with Mr. Houston over the years, they cost a few dollars, didn't they, for gas, oil, and transportation and grub, isn't that true?

"A. Yes." [223]

The Court: Pardon me. How many pages have you got left?

Mr. Angell: Beg your pardon?

The Court: How many pages do you have left?

Mr. Angel: Quite long. Must be at least ten or twelve more.

The Court: We will take a recess until two.

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [224]

Mr. Clausen: May I interrupt the reading of the deposition by calling a doctor out of turn?

Mr. Angell: We will have no objection.

Mr. Clausen: Dr. Bennett, will you step forward, please?

A. E. BENNETT

called as a witness on behalf of the defense; sworn.

The Court: Your full name, Doctor?

A. A. E. Bennett.

The Court: Where do you reside?

A. Berkeley.

The Court: Your business or your occupation is that of a physician? A. Yes, sir.

The Court: Do you specialize in some particular activity?

A. In neurology and psychiatry.

The Court: Take the witness.

(Testimony of A. E. Bennett.)

Direct Examination

Mr. Clausen: Q. You are duly licensed, are you, Dr. Bennett, as a physician and surgeon in the State of California? A. Yes, sir.

Q. And you are a graduate of what school or colleges, Doctor? [225]

A. The University of Nebraska.

Q. And in connection with your chosen work, have you taken certain post-graduate training?

A. Yes, sir.

Q. And what schools or colleges, Doctor?

A. I served in hospitals in Philadelphia connected with the University of Pennsylvania and Johns Hopkins Medical School, three years post-graduate training in neurology and psychiatry.

Q. And in that regard, also, are you licensed in any other states?

A. California and Nebraska.

Q. Are you on any so-called national boards?

A. Well, I don't know quite what you mean.

Q. Well, do you belong to any national boards?

A. Well, I am a certified specialist in neurology and psychiatry by the American Board of Neurology and Psychiatry.

Q. And do you, Dr. Bennett, belong to any societies, medical societies, in connection with your medical practice and specialty?

A. Yes, a good many.

Q. Could you list a few, Doctor?

A. Well, I am a fellow in the American Psychiatric Association, and have been a member of the

(Testimony of A. E. Bennett.)

Q. In your present work, Doctor, do you treat some of those people for those tendencies?

A. Yes. That's the major part of our work.

Q. For example, are some of those people so afflicted with suicidal tendencies, those who the majority of persons would say should be satisfied with their lot in life, but nevertheless do have the suicidal tendencies?

A. Oh, yes. That doesn't have too much to do with the question of suicide. It's a question of mental illness.

Q. In what types of personalities, Doctor, do you categorize this malady types, in that regard, of those who have suicidal tendencies?

A. Well, in general, the bulk of them fall into the depressive reactions, people with morbid depressive reactions are more prone to suicide than others, but we do also see them in other conditions, organic brain diseases and delirious states and others that aren't obviously depressed, but the large majority come in the depressive group.

Q. Are there some types, Doctor, who are both depressed and then at other times sort of happy-go-lucky and combine those two moods with a certain amount of drinking?

A. Yes, that's a very common form known as the manic-depressive [229] type, in which they have periods of moods of elation and periods of depression, and if they are alcoholic those phases are exaggerated with them, as a rule.

Q. Could such a person apparently be one who

(Testimony of A. E. Bennett.)

loved life, be happy at home, happy and successful in business, and yet have suicidal tendencies?

A. Yes, that is correct.

Q. Now, into that category, Doctor, what is the name of the personality that would be of that type?

A. Well, we speak of those as cyclothymic personalities, individuals who are subject to mood swings, either elation or depression, that go beyond the normal. When it becomes excessive, then we have a phase we speak of as hypomania. And when it becomes full-blown, so that their judgment is impaired or that they are unable to make adjustments, then they become psychotic and we speak of them as suffering from manic psychosis—manic-depressive psychosis, but the category is the cyclothymic type of personality.

Q. That is what you call the cyclothymic?

A. Cyclothymic.

Q. Cyclothymic. Now, that particular type, Doctor, is that type subject to swings from depression swings to feelings of remorse on occasions?

A. Yes, over-react to depressive swings, particularly with alcohol or they can go the other way, go into the elated phase. [230]

Q. Now, Doctor, just so we may know your own experience, in how many cases have you treated those; could you enumerate how many cases such as that you have personally handled?

A. Many hundreds; I couldn't give an estimate.

Q. On occasions do people of that kind have certain things that would trigger, as it were, at

(Testimony of A. E. Bennett.)

the moment some part of their body, so that they would take their own life?

A. Trigger some part of the body? Could you clarify that?

Q. What I had in mind, Doctor, a person such as that particular type that you have mentioned, subject to these things, and who, for example, might be fatigued or frustrated or under strain or have had interference with normal sleep and rest, in such a type of personality as you have indicated exists would there be in those things that I have enumerated something which might upset the balance of the person?

A. I think in a general way that that is correct, that excessive mental strain or fatigue or physical fatigue might trigger or set off one of the overt other reactions, but frequently it is responsible—I mean, without any evident or obvious reason for it.

Q. And then on those occasions is it your experience that those people would take their own lives?

A. Yes; in the depressive phase, yes.

Q. That imbalance or that setting off of the balance of interference or reaction upon their sympathetic system? [231]

A. Well, the emotional disorder, depressive disorder, does upset the sympathetic nervous system, if that is what you mean.

Q. Yes. Now, Doctor, assume a person about 50 years old, who is married, with two grown—. By

(Testimony of A. E. Bennett.)

the way, let me ask you, you were present in the courtroom this morning, were you, Doctor?

A. Yes, sir.

Q. And I also let you read a deposition this morning of Jean Pearson—at least you glanced over that deposition? A. Yes, sir.

Q. Now, Doctor, assume a person about 50 years old, married, with two grown daughters, United States manager of a foreign insurance company, the salary about \$20,000 a year, several known pressing debts, accustomed to having alcoholic drinks before lunch and dinner, he is the productive go-getter type, occasionally traveled, on production trips, getting out to meetings and getting business on these occasions, would also occasionally have alcoholic drinks; while in San Francisco engaged in his activities he is reserved and quiet, refined, although of a friendly gregarious extrovert nature, but in Lakeview, Oregon, while on vacation, on hunting trips, without his wife, usually he is in an exhilarated mood; the difference in his demeanor from the San Francisco conduct may be described as a “Jekyll and Hyde” transformation. While in Oregon he dresses in cowboy clothes. On occasion, for example, wears a coonskin cap. He acts rather overbearing, unruly; for example, [232] tried to serve himself in a restaurant, “just takes over,” acted in the parlance of the street as a “big shot.” Monopolizes conversations, been inconsiderate of other people, likes a roaring good time, has been a fast driver, egotistical, yet interested in

(Testimony of A. E. Bennett.)

social work, takes pills and has a cure for everything, has been concerned about his health. On one occasion, for example, fired a rifle in his host's real estate office. Has gone under the nickname of "Wild Bill Hiccup." He would be under the influence of alcohol part of the time. On occasion would begin drinking in the morning, have drinks during the day; accustomed to having drinks during the day. Before his death he was involved in an automobile accident with a woman passenger, whom he demonstrated anxiety to get hurriedly paid, who was paid some thousand dollars, who is rumored to have written him since. His wife, at the time of the police investigation of his death, February 22, 1954, reported to the police substantially that he had periods of depression and recently had been depressed, shortly before his death. His death occurred by gunshot wound through the left breast, the carbine, the muzzle of the carbine pressed against or right close to his breast while leaning over parallel to the floor; his arm able to reach to the trigger of the carbine so that the body is parallel to the floor and the bullet goes up to the ceiling straight up from where the gun was pointing, and this was shortly after he arose at about [233] one-thirty in the afternoon following a dinner party which had lasted until about eleven-thirty the night before, at which party he had some drinks, one or two or more drinks. At the time of his death he is dressed in his sleeping clothes and the shooting occurred in a lower remote

(Testimony of A. E. Bennett.)

corner of the basement of his Berkeley home.

Now, from my description and assumptions here, Doctor, will you tell me whether that individual falls into one of the suicidal types?

Mr. Angell: Just a minute. Your Honor, before that is answered, may I make my objection?

The Court: Yes.

Mr. Angell: I object to the question upon the ground it is compound, unintelligible, assumes facts not in evidence, calls for the conclusion of this witness which is not subject to expert testimony, that there is no showing that this doctor ever examined Mr. Houston, and upon the ground it is not proper examination.

Mr. Clausen: If the Court please, in answer to that, I will say that I feel that it is proper testimony. The case of McClelland vs. Great Southern Life Insurance Company, 220 Southwest 2d 515, it was somewhat similar testimony by a physician of a depressed state and to the effect that this physician, who I believe was the physician of the person, was led to believe the insured had experienced suicidal thoughts. [234]

What I am doing now——

The Court: In that case the doctor examined the patient?

Mr. Clausen: There is a different type of situation as where I believe in this case the doctor was the physician and had examined the party who committed suicide, your Honor.

In my present question, though, I am addressing

(Testimony of A. E. Bennett.)

these remarks—or, rather, the question to a man far more skilled in ascertaining that particular answer than he was asking this doctor about, because Dr. Bennett is an expert by training, experience and study in this very field of suicidal thoughts, and I am giving him the assumptions, your Honor, which the evidence in the case demonstrates plus will demonstrate.

The Court: The court is ready to rule. The objection will be sustained.

Mr. Clausen: Q. Now, Doctor, in the particular type of—I believe you called it cyclothymic personality—would such a type of personality include one who was a successful businessman?

A. Yes, they frequently are extremely successful.

Q. Would such a personality include a person who would be happy at home?

A. Would be happy at home?

Q. Yes. Have a happy home life and—apparently a happy home life.

A. Oh, yes, that's— [235]

Q. And would such a personality include also one who would apparently—during the moments of exhilaration apparently love life?

A. Yes, they are very extroverted outgoing people.

Q. Would such a personality include one who also would have periods of depression and perhaps have been depressed shortly before the death by

(Testimony of A. E. Bennett.)

something that caused depression even though that something might have been relatively trivial?

A. Yes, they invariably have depressive phases.

The Court: What does the record disclose in relation to depression?

Mr. Clausen: That the wife stated to the police officers—. May I have the report?

Mr. Angell: The report isn't in evidence, your Honor.

The Court: What is it?

Mr. Angell: The report which counsel is about to call the court's attention to is not in evidence.

Mr. Clausen: Maybe so, but I am refreshing my own recollection to answer his Honor's question.

The Court: All right.

Mr. Angell: I submit, you can't refresh your recollection on something that isn't in evidence.

The Court: I inquired as to what the evidence disclosed in reference to depressions.

Mr. Angell: Yes. I will answer that directly, your [236] Honor, here from the—that the deceased had been working hard lately and usually was depressed this time of the year.

The Court: Whose testimony is this?

Mr. Clausen: The wife to the police officers on arrival at the scene after the shooting. Officer Pine and Officer Parker, who testified yesterday morning, and the period of the year being the time, your Honor, that the evidence shows, when these statements for the company were due.

(Testimony of A. E. Bennett.)

Mr. Angell: May I see what you are reading from, Mr. Clausen? What is it that you are reading from?

Mr. Clausen: This is a memorandum of the transcript of the hearing before the coroner and was the question that I asked the officers yesterday morning.

Mr. Angell: If your Honor please, I ask now to strike the statement of counsel——

Mr. Clausen: I am answering his Honor's question.

Mr. Angell: May I make my motion, Mr. Clausen? I ask now that the statement of counsel go out as being an incorrect statement of the record, that the record shows that counsel is reading from a coroner's report which, your Honor, is not admissible in evidence, and——

Mr. Clausen: I did not quote this. I am answering his Honor.

The Court: I asked what the record disclosed.

Mr. Clausen: Yes, exactly. [237]

The Court: What does the record disclose in that respect?

Mr. Clausen: That's right, exactly as I stated to your Honor. If there is any question, I would like to have the privilege——

The Court: I want to refresh my own memory in relation to the matter. I don't recall it.

Mr. Clausen: All right. May I have, then, the reporter read back the evidence of Inspector Pine—Mr. Pine—of yesterday morning?

(Testimony of A. E. Bennett.)

The Court: However, I think the best way under the circumstances is to allow the testimony to go in over your objection subject to your motion to strike.

Mr. Angell: May I have the question read, your Honor? I have forgotten what that question was.

The Court: Read it, Mr. Reporter.

(The record was read.)

Mr. Angell: I now hold in my hand, your Honor—I am going to move or ask that my objection go ahead of the answer on the ground that it assumes facts not in evidence in this case. I here have Officer Pine's notes and they are Defendant's Exhibit A, which I hold in my hand. I show it to your Honor. There is not one single word said in those notes about any depression.

The Court: Give it to counsel and let him point it out.

Mr. Clausen: These notes, if the Court [238] please, are not supposed to contain that. Officer Pine, who testified yesterday morning, produced these notes as being his rough notes. His actual testimony, your Honor, is exactly as I have stated, and I would ask the court's permission to have the reporter find it right now.

The Court: We will take a recess and the reporter can find it during the recess.

(Short recess taken.)

The Court: (To Reporter:) You may read the record.

(Testimony of A. E. Bennett.)

The Reporter: (Reading.) (Testimony of Officer Pine on November 7, 1955:)

“Q. All right. And did you have a talk with her——. Well, of course you did. You obtained this information from her? “A. Yes.

“Q. On that occasion was anything said by you to her or she to you concerning the apparent motive of the suicide, any questions of his action and conduct of late? “A. Yes.

“Q. All right. Now, who was present when that statement was made, Mr. Pine?

“A. What statement?

“Q. The statement by Mrs. Houston to you concerning the subject that I just now asked you about.

“A. Well, there was much conversation. I [139] don't—I can't say just who was present at any one time. There was quite a bit of conversation.

“Q. I understand.

“A. Between all of us.

“Q. What did Mrs. Houston say to you on that subject, Mr. Pine?

“A. I asked Mrs. Houston if her husband had at any time threatened suicide.

“Q. Yes. A. And she said no, he hadn't.

“Q. Yes.

“A. And I asked her if he had been planning on doing any shooting or going on a hunting trip.

“Q. Yes.

“A. She said he hadn't.

“Q. Yes.

(Testimony of A. E. Bennett.)

“A. I asked her if he had been under any emotional stress or if he had any problem of late that would cause him to do a thing like that, and she said—at the beginning she said that he had at times suffered periods of depression.

“Q. Periods of depression at times?

“A. Yes.

“Q. And what else did she say on that subject, Mr. Pine?

“A. She said, however, he was in fine spirits over the past weekend, he had been in good [240] spirits of late except that he was working hard, working long hours getting out some reports which were a yearly function with his—in his business.

“Q. Working hard, long hours, getting out reports that were business reports connected with his business, is that correct? “A. Yes.

“Q. Now, these periods of depression to which she referred, did she state whether those periods of depression occurred coincident with his work in getting out such reports for his business?

“A. Well, I just didn’t—she didn’t elaborate and I just didn’t gather what her actual meaning was by ‘periods of depression.’ She said he was under stress at times, like these, when he was preparing these reports.”

The Court: Did you have any knowledge of that before you came here?

A. Did I have knowledge of that?

The Court: Of that testimony.

A. Yes, I had some knowledge. I didn’t have

(Testimony of A. E. Bennett.)

the exact knowledge that I have gotten here today, but I had some information to the effect that the Berkeley police had interrogated her and gotten some sort of a statement about the fact that he was subject to depressive spells.

The Court: Proceed.

Mr. Clausen: Q. And would a personality [241] type that you have mentioned that you call the cyclothymic type, Doctor Bennett, include a person who did have periods of depression?

A. Yes, sir.

Q. And does that personality type have swings in moods from a period of depression to perhaps good spirits and back again to depression?

A. Yes, usually. They are not on an even keel emotionally. They are either—they either go over to the exhilarated or latent phase or depressive stage. They don't stay even, but they are not consistently alternating; they don't have to be, they may be.

Q. Is such a personality type, Doctor Bennett, prone to suicide?

A. Yes, about 15 to 20 per cent of them end up as suicide.

Mr. Clausen: 15 to 20 per cent. You may take the witness.

Mr. Angell: No questions.

The Court: Step down.

(Witness excused.)

Mr. Clausen: May Doctor Bennett be excused, your Honor?

(Testimony of A. E. Bennett.)

Mr. Angell: As far as we are concerned.

The Court: You may be excused, Doctor Bennett.

Mr. Angell: We were reading the deposition. We left off at line 22, but to go back and get continuity, let's step back to line 17.

VIRGINIA WILKERSON

(Reading.)

"Q. So when you say Mr. Houston was selfish, you weren't referring to an action of that kind.

"A. No.

"Q. You would say he was unselfish?

"A. Yes."

Mr. Angell: Now, we have read that far. I will pick up the next question where we were.

Mr. Clausen: What page?

Mr. Angell: Page 29, on line 22.

(Reading.)

"Q. As I understand your testimony, you are restricting your use of the word to some personal habits of coming into the house as a guest and not cleaning the mud off his shoes, or something like that? "A. Yes.

"Q. Now, these frequent hunting and fishing trips you say you and members of your family took with Mr. Houston over the years, they cost a few dollars, didn't they, for gas, oil, and transportation and grub, isn't that true? "A. Yes.

"Q. Was Mr. Houston ever stingy about pay-

(Deposition of Virginia Wilkerson.)

the witness, asking the witness to put a stamp on that—. It is the impression of the witness how a person did a thing, instead of asking what the person did. It would be in my opinion, your Honor, subject to that objection.

The Court: The objection will be sustained. Develop the facts, whatever they be.

Mr. Angell: The only way I can develop the facts here would be through these questions. There were no objections made to these questions at the time the deposition was taken.

The Court: Well, you take it that he waived the objection? [246]

Mr. Angell: I do, very definitely. He didn't object that it was asking for the conclusion of the witness, "Tell us how he handled such a gun, and that sort of thing." Now, obviously it called for an objection to it, and for him to say: I object, it calls for a conclusion; then the attorney obviously would have backed up and got it, elicited the information, and said: What did he do? And here they permitted him to go. This witness's deposition was taken up in Oregon, and obviously if the question is not allowed the answer will not go in. I think Mr. Clausen should have made his objection there, and given the attorney the opportunity to present the testimony.

Mr. Clausen: If the Court please—

Mr. Angell: The court is not bound by it. It is only an observation of the witness.

Mr. Clausen: If the Court please, the stipulation

(Deposition of Virginia Wilkerson.)

of the parties at the outset of the deposition appears to be this:

“It is stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.”

In other words, it wouldn't lie in my mouth now to say that it was a leading question. That's all. But, your Honor, under this stipulation, which is normal in these cases, on the [247] reading of a deposition we can object, exactly as the stipulation said, to the questions.

Mr. Angell: With two exceptions, and that is the form of the question, and one of the forms is a leading question and the other is it calls for the conclusion of the witness.

Mr. Clausen: No——

The Court: Matter submitted, gentlemen?

Mr. Angell: Yes.

The Court: The objection will be sustained. Develop the facts, whatever they may be in relation to the gun, manner carried if any, or if observed.

Mr. Angell: The next question:

“Q. Did he convey the attitude that he was a little wiser than some of the rest of you, or more experienced? Did he convey the impression that he was more experienced in those things than you might be?”

Mr. Clausen: Just a moment. We will object to that, your Honor, on the same ground, whether

(Deposition of Virginia Wilkerson.)

a man, a person, conveys an impression to another person for a third person to guess at what impression the first person conveyed surely calls for a conclusion and the opinion of the witness, asking the witness to guess.

The Court: Objection sustained.

Mr. Angell: (Reading.) [248]

"Q. Did any children ever accompany you and Mr. Houston on these hunting trips?

"A. Yes.

"Q. Whose? "A. My son.

"Q. Take it back to 1953. Did the boy ever go out on a trip then? "A. Yes.

"Q. How old was the boy then?

"A. Eleven.

"Q. He was eleven years of age at that time?

"A. Yes.

"Q. And Mr. Houston was on that hunting trip with you, was he? "A. Yes.

"Q. And who drove the vehicle, between the three of you—you and the boy, or him, or were you in the same vehicle, same car?

"A. Well, golly, we have been deer hunting and duck hunting both. It is hard to remember.

"Q. When you and the boy, your son, I mean, and Mr. Houston would come back in a motor vehicle from a deer hunt, what was the practice on your part and your son's part, so far as taking safety precautions with your firearms, before he would put them in the car, or [249] did you take any precautions?

(Deposition of Virginia Wilkerson.)

"A. I had the shells taken out of the guns before they were put into the car.

"Q. Was that your general practice?

"A. Yes.

"Q. Your boy? "A. Yes.

"Q. What was the general practice of Mr. Houston?"

Mr. Clausen: To which we will object, if the court please, on the ground no foundation has been laid and it would be irrelevant in this matter. We are not concerned with something that happened up in Oregon. We are concerned with what happened on February 22, 1954.

Mr. Angell: The same statement, the objection was waived to the form. It is a proper question and answer. No objection is made as to what her practice was. When Mr. Houston's practice comes in, he gets up and objects.

The Court: The objection will be overruled.

Mr. Angell: (Reading.)

"Q. What was the general practice of Mr. Houston?

"A. He didn't do it."

"Mr. Cooper: I believe that's all."

Mr. Clausen: I will proceed. This is redirect examination. Now I will ask. (Reading.) [250]

"Redirect Examination by Mr. Clausen:

"Q. Mr. Cooper just asked you the basis for this feeling of hostility. Isn't it true that the cause of part of that feeling is your friendship with the Houston family? "A. No.

(Deposition of Virginia Wilkerson.)

“Q. Would you prefer to find——”

Mr. Clausen: This question was not answered. Then Mr. Cooper interrupted.

“Mr. Cooper: Just a minute. Were you present when the man died?”

Mr. Angell: Just a minute. I ask the other question be read.

Mr. Clausen: I will read the question. There is no answer to it.

“Q. Would you prefer to find that the Plaintiff should recover in this case, Mrs. Charlotte Houston?” There is no answer to that, your Honor. Then Mr. Cooper—. The reason for it is that Mr. Cooper has interrupted and the words follow there:

“Mr. Cooper: Just a minute. Were you present when the man died? “A. No.

“Q. You know nothing about those facts?

“A. It is a personal feeling with me.” [251]

Mr. Clausen: Now, the next question I withdraw, your Honor.

Mr. Angell: Just a minute. Your Honor, he asked this question.

Mr. Clausen: I didn't ask it.

Mr. Angell: He asked it on redirect, and now he is going to withdraw the question.

Mr. Clausen: It is an improper——

Mr. Angell: I ask that the deposition be read and the ruling be made after it is read. The question was asked. If it is improper, it is his question.

The Court: He is entitled to a record. Proceed.

(Deposition of Virginia Wilkerson.)

Mr. Clausen: Oh, yes, I understand. I say, I was going to state my point, your Honor. The next question is in my opinion objectionable, no matter who asked it, and it happens to have been asked by my own son, and therefore I at this time—the question is this:

“Q. In other words, in your opinion he didn’t commit suicide?”

And then there is an answer to it. I am objecting to the answer on the same ground that was objected to before, namely, that of course calls for an opinion and conclusion of the witness, and being an improper question it doesn’t matter who might have asked the question at the taking of the deposition. Now we are appearing before your Honor in the capacity of [252] attempting to find this very question. Therefore it is wrong, and therefore I object.

Mr. Angell: This is the first time we ever heard counsel asking a question and then got the answer he didn’t like and so he objects to the question that he should never have asked.

Mr. Clausen: I wasn’t ever there.

Mr. Angell: I don’t care whether you were there or not. Your son was there and he was representing this defendant. And counsel is nothing but a representative of the client. There is nothing personal about it at all. This attorney for this insurance company, the defendant here, asked this question. There was no objection by counsel for the plaintiff. He went on a fishing expedition, your Honor, and he got just exactly what counsel usually get when

(Deposition of Virginia Wilkerson.)

they go on a fishing expedition; they got what they weren't looking for, and now he is asking this court to strike out the answer. I will admit that the question of whether a thing is suicidal or not a suicide is a question for this court. But a person may have an opinion as to whether someone might know whether—might be that kind of a person who did or did not. It is in no way binding on this court. The court will determine that question when the evidence is all in. I submit that this question should be read into the record and the answer given, and then if there is any objection to that, let the objection be made at that [253] point. But this thing of reading only what you want to out of your own deposition——

The Court: Well, he has read it.

Mr. Angell: He hasn't read the answer.

The Court: Read the answer.

Mr. Clausen: (Reading.)

"A. He wasn't the kind of person to do it." Which I say, your Honor, is the very question—. The question itself says: "in your opinion." Clearly the question and the answer are improper and it wouldn't make any difference—. In other words, the court, your Honor, is not called upon—when I voice what I see is error, no matter where I find error and call it to the attention of the court, the court by reason of the relationship of the tongue or inexperience of counsel is not called upon to perpetuate error, and therefore I say that since it is error that we should object, we do object and ask the answer be stricken.

(Deposition of Virginia Wilkerson.)

Mr. Angell: You ask what her opinion is. Her opinion is not error. And now having gotten himself in that box, counsel went forward, extricated himself, and I think the next few questions and answers, if they are given, they will be much more enlightening to the court than this argument, and I will ask that the questions and answers be read as questioned and answered in the record.

Mr. Clausen: The next few questions and answers are [254] merely on whether she was a psychiatrist or not. But this specific question is this: "in your opinion," and then I asked—then he asked her opinion as to the matter to be decided by this court. We say that is objectionable, your Honor. We urge the objection.

The Court: The court is prepared to rule. The objection will be sustained.

Mr. Clausen: Then the next question is line 13:

(Reading.)

"Q. However, you are not a psychiatrist?

"A. No.

"Q. And have you ever made any study of suicides? "A. No.

"Q. In fact, ——"

(Counsel rereading deposition.)

"Q. However, you are not a psychiatrist?

"A. No.

"Q. And have you ever made any study of suicides? "A. No. [255]

"Q. In fact, you have no personal knowledge

(Deposition of Virginia Wilkerson.)

whatsoever of the method or manner in which Mr. Houston died? "A. No.

"Q. On this San Francisco visit you were referring to in January, 1954, did Mr. Houston on that occasion have anything to drink? "A. Yes.

"Q. What.

"A. I believe it was a vodka collins.

The Court: What's that?

Mr. Clausen: Vodka, a Russian drink Judge—your Honor.

The Court: Proceed.

Mr. Clausen: (Reading.)

"Q. That was at lunch? "A. No.

"Q. Did Mr. Houston ever complain of having headaches? "A. No.

"Q. I believe you testified that he had a cure for everything. Do you recall what these pills, etc. were, or what they were for?

"A. No. Penicillin for colds, etc.

"Q. Would you say that he was overly conscious of [256] his state of health?

"A. (Hesitates) Yes.

"Q. Now, with respect to this Rotary Club operation, that is a charity, is it not? "A. Yes.

"Q. Over the years as you observed Mr. Houston, would you say that he was the type to be very much interested in social work? "A. Yes.

"Q. Now, Mr. Cooper read to you the allegation in the answer with respect to the misrepresentation. You, as I remember, testified that you would describe Mr. Houston as a——"

(Deposition of Virginia Wilkerson.)

Mr. Clausen: Now, this answer, your Honor, is one which was objected to before and when objected to before your Honor sustained the objection. I will read the question:

“Q. Now, Mr. Cooper read to you the allegations in the answer with respect to misrepresentations. You, as I remember, testified that you would describe Mr. Houston as a ‘social’ drinker and an ‘occasional’ drinker. By social, you of course have reference only — can only have reference — to the times when you observed him, is that correct?”

Your Honor, we say there again the same objection we urged this morning, namely, that what counsel, Mr. Cooper, [257] did, to take the allegations of the Answer, transform into a question, and asked the witness her opinion of it, so that again is being perpetuated.

Mr. Angell: Counsel asks these questions. He gets answers he doesn’t like. Then he objects to them here in court. He is not making any objection up there. Remember, these are his own questions to which he is objecting.

The Court: The objection will have to be sustained. It may go out.

Mr. Clausen: Now, the next one is just a follow-along of the one your Honor sustained an objection to, so we withdraw that so your Honor may— So the record may show exactly what I am talking about, I will read it:

“Q. All those times were social times. Is that correct?”

(Deposition of Virginia Wilkerson.)

Then the next question is again one of the objectionable ones because the very word "Occasional" is used again there in quotes, again lifting it from the allegation of the answer. So we withdraw that.

Line 21: (Reading)

"Q. But, as a matter of fact, it is true, is it not, that when Mr. Houston was here in Lakeview that he was accustomed to having large amounts to drink per day?" [258]

Mr. Angell: We object to the withdrawal of that and ask for the court's ruling on it, for the record.

The Court: Read it:

Mr. Angell: And may we also, in order to not interfere with you—I would also like to ask that the deposition be marked in evidence and given an exhibit number.

The Court: It will be admitted and marked. What is the exhibit number?

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

(Thereupon, the Deposition of Virginia Wilkerson, taken by the Defendants, on October 26, 1955, was received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Clausen: The request right now before the Court is that I read the question to which I object:

"Q. When you said he was an 'occasional' drinker, you meant to say that he would drink on occasions, on social occasions. Isn't that correct?"

To which we object, again, your Honor, that it is

(Deposition of Virginia Wilkerson.)

just a follow up of the basic question as to which your Honor sustained an objection.

The Court: Let the question and answer stand. The objection will be overruled.

Mr. Angell: The answer is "Yes."

Mr. Clausen: Reading. [259]

"Q. But, as a matter of fact, it is true, is it not, that when Mr. Houston was here in Lakeview that he was accustomed to having large amounts to drink per day? "A. As a social function.

"Q. Day after day, isn't that correct?

"A. He had a drink every day.

"Q. Do you know his drinking habits in San Francisco? "A. No.

"Q. Do you know whether Mr. Houston suffered spells of insomnia? "A. No.

"Q. You don't know? "A. (Shakes head)

"Q. What were Mr. Houston's habits with respect to eating here in Lakeview? Did he have three meals a day? "A. Yes. Probably more.

"Q. Probably more? "A. (Nods head)

"Q. You mean four or five meals a day?

"A. Yes. He would always have something before he went to bed.

"Q. Have you ever observed Mr. Houston oppressed? "A. No.

"Q. Would you say that he was always in an [260] exhilarated mood? "A. Yes.

Mr. Angell: To complete the record: "I think that is all."

And then there is:

(Deposition of Virginia Wilkerson.)

“Recross Examination by Mr. Cooper:

“Q. Going back to the drink that you said Mr. Houston had in San Francisco—I am referring, and I think you are, too, and correct me if I am mistaken—to the day you and your father visited his office. Is that right? “A. Right.

“Q. Do you mean to give the impression that that drink was had in the office or en route home or some public establishment?

“A. In some public establishment.

“Q. Not in the office? “A. No.

“Q. Did he offer a drink to you in the office, or to your father? “A. No.

“Q. Now, then, coming down to the scope of Mr. Houston’s remedies, I want to explore that a little bit further. I understand from your testimony that he had, or thought he had, ulcers. Is that right?

“A. No. I don’t believe that ulcers was ever mentioned except laughingly.

“Q. But your father was bothered over the years? Is that right? “A. Yes.

“Q. And he offered your father some free medical advice on the subject. Is that right?

“A. I suppose.

“Q. Did you say that the gentleman carried remedies for any other particular medical difficulty that a person might have, or did he even carry a remedy for the ulcers?

“A. He was carrying vitamins, pills, and penicillin.

“Q. He carried penicillin? “A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. What was his reason for the penicillin?

“A. He had been sick or just gotten over a cold.

“Q. Was the gentleman susceptible to colds?

“A. I don’t know.

“Q. Did you ever see him have a cold?

“A. Yes.

“Q. How many times would you say that situation had been? “A. Probably three times.

“Q. Did he carry any other kind of remedy on his person? [262]

“A. He just had pills. I don’t know what they were for or why.

“Q. Where did he have them?

“A. In his little grip.

“Q. Did he carry them on his person as he went about? “A. Yes.

“Q. Would you call this a rattlesnake country up here? “A. Yes.

“Q. Did he carry any antidote for a rattlesnake bite? “A. Scotch.

“Q. We have ticks up here, do we not?

“A. Yes.

“Q. And sometimes they can be quite serious—I mean their bite? “A. Yes.

“Q. Did he have any preventative for that—any pill or serum or anything else, or did the ticks concern him very much? “A. Not that I know of.

“Q. You mentioned that he was interested in social work other than helping the Rotary junior livestock auction; that he was interested in social work over and [263] beyond this? “A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. What other social activity did he support in this community either with his physical efforts or with his cash that you know of?

“A. None, other than he was interested in boys and helping them.

“Q. Is that what you meant by social work?

“A. Yes. He was interested in furthering children's education and things like that.

“Q. What do you base that statement on?

“A. He has talked to me on the subject of sending his nephews and Don Campbell, which he called his son, and helping them along as best he could.

“Q. Now, coming to this question of whether or not he was an ‘occasional’ or ‘non-occasional’ drinker. When he did take a drink and there were friends about, would his companions drink with him, or would he drink alone?

“A. Always with someone.

“Q. Coming to his eating habits, do you know whether or not during the course of the years that you knew Mr. Houston whether or not he was accustomed to going to any other part of the West and spending as much time in the outdoors as he did here at Lakeview?

“A. He liked to go to Denver. He enjoyed going [264] there.

“Q. That is a big city, isn't it?

“A. On pack trips out of there, and the Canadian Rockies. He liked to go up there.

“Q. But in his trips here to Lakeview, as I understand your testimony, over the 10 years you

(Deposition of Virginia Wilkerson.)

knew him, his outdoor activities in this community, at least, were pretty much restricted to association with your father and friends of your immediate family. Isn't that right? "A. Yes.

"Q. And you have acted as host upon many occasions to people coming to this community from San Francisco or Portland and other big cities, have you not? "A. Yes.

"Q. And you have taken a lot of them into the wide open spaces to hunt and fish with your father?

"A. Yes.

"Q. And you have had occasion to observe their eating habits? "A. Yes.

"Q. Because you helped prepare the food on many of those trips? "A. Yes.

"Q. Isn't it true that if you take a city businessman, as you have testified Mr. Houston is, and bring him [265] out in the wide open spaces and hunt and fish and hike, isn't it true that that will stimulate the appetite of that person? "A. Yes.

"Q. That they will eat more than they would back at home in their habitual type of life.

"A. I would myself. I can't answer for Mr. Houston.

"Q. I am talking about people who have come in here that eat quite a bit, and have a tendency to eat more than three times a day. "A. Yes.

"Q. Were you subpoenaed here today, Mrs. Wilkerson? "A. Yes.

"Mr. Cooper: I have no further questions.

"Mr. Clausen: Did you ever see Mr. Houston

(Deposition of Virginia Wilkerson.)

wear a coon-skin cap in Lakeview? “A. No.

“Mr. Clausen: That is all.”

Mr. Clausen: We will recall Mr. Wainwright, your Honor.

JAMES H. WAINWRIGHT
previously sworn, recalled.

Redirect Examination

Mr. Clausen: Q. Mr. Wainwright——

I believe the foundation for this testimony was laid yesterday but counsel objected that at that time there had been no evidence of any drinking, and therefore I asked the [266] court's permission to withdraw the witness and to recall him when that testimony had been adduced.

At this time, your Honor, I merely am going to proceed with some of the questions that I was going to ask yesterday.

The Court: Do I understand then that all the testimony with relation to drink is in the record?

Mr. Clausen: At this time, your Honor, yes, your Honor.

The Court: Do you expect to call more witnesses in that respect?

Mr. Clausen: No, your Honor.

The Court: Proceed.

Mr. Clausen: Q. With regard to your position with the company and your duties, you testified to that, yesterday, Mr. Wainwright, the duties and the experience——

(Testimony of James H. Wainwright.)

I am thinking of this, your Honor, as I am asking the question, your Honor asked me whether all the evidence is in. I don't know what the letter is going to say that is going to be produced, and I don't know what the—I had also reserved, your Honor, the right to call the two policemen when I got their records which were put in yesterday, but I don't think any of those involve any drinking.

The Court: All right.

Mr. Clausen: Q. Mr. Wainwright, in connection with your position with the company and your experience, I asked you the nature of your duties, and you testified yesterday, I [267] believe, you testified regarding this file and the application with which we are concerned, is that correct? A. Yes.

Q. And are you familiar with the file and the application in this case? A. I am.

Q. And in connection with the underwriting of the particular policy that we are concerned with here, did the company follow its usual practice?

A. It did.

Q. And did the company rely upon the representations and the statements contained in the application? A. It did.

Q. And induced by that, did the company on November 3, 1953, or whenever it was, issue the policy? A. Yes.

Q. And did the company have any knowledge at that time of the drinking habits of——

Mr. Angell: Just a minute——

(Testimony of James H. Wainwright.)

Q. (Continuing) —Mr. Houston as disclosed now by the evidence in this case?

Mr. Angell: Just a minute. Are you through with the question.

Mr. Clausen: Yes, I am now.

Mr. Angell: All right. I object to it on the ground [268] that it is obviously a corporation which is quite inanimate, couldn't know anything except that of its officers. How this witness could tell what other people in the company knew or didn't know is beyond comprehension. So I submit the question is unintelligible, couldn't be answered by this witness because he couldn't know of his own knowledge. If he asked the witness whether he knew if Mr. Houston took any drinks as indicated by the record, I think it would be a legitimate question.

Mr. Clausen: It is the only way a corporation can testify, your Honor, through its agents, and I am asking the agent of the corporation. I say, I am asking the agent of the corporation the question, as to which this man is the most qualified to answer in the corporation.

The Court: What is the question again?

Mr. Clausen: Whether the company knew of these drinking habits when it issued its policy.

The Court: I take it, it follows that they did.

Mr. Clausen: That's right.

Mr. Angell: I don't know how they could. The knowledge of the corporation would be the knowledge of its officers, and how this man would know——

(Testimony of James H. Wainwright.)

The Court: Objection sustained. Let it go out.

Mr. Clausen: Q. And did you yourself at any time have any knowledge of the drinking habits of Mr. Houston as disclosed [269] by the evidence in this case? A. Not until after his death.

Q. And you have been sitting through the trial of this case, have you? A. Yes.

Q. Did any officer or member or person in the defendant's employ to your knowledge have knowledge of the drinking habits of Mr. Houston until after he passed away? A. No.

Q. And when, to your knowledge, was that information obtained and acquired?

A. It first came to the company's attention on the investigation made following Mr. Houston's death. [270]

Q. All right. And if the company had had that information, in the light of your experience and practice, with the company, would the company have issued its policy of insurance?

A. It wouldn't.

Mr. Angell: Just a minute. May I make my objection. I object as incompetent, irrevelant and immaterial, calling for the conclusion of this witness, asking for opinion testimony, which opinion testimony is not admissible. The witness was asked the question whether the company relied on it. I think that is a proper—upon the statements in the application—proper question to ask. It follows as a matter of law anyway. To ask whether they would have issued the policy if they had known what is here is

(Testimony of James H. Wainwright.)

totally objectionable because it assumes the very question to be determined by this court, and that is whether, as the evidence produced here as to the drinking habits of Mr. Houston were anything other than stated in that application.

The Court: Submitted?

Mr. Clausen: No. May I just state this, your Honor, Mr. Angell misconceives my question. I am not asking the witness to speculate or give his opinion. What I am doing is asking the witness of his own knowledge and considering as he knows the practice of the company, in the light of those facts would the company, had it known these drinking habits, have issued the policy. [271]

Mr. Angell: Same objection. It is just as objectionable as the first and that is speculating as to whether a man would or would not have entered into a contract had he known something that he claims now exists at the time he entered into the contract. I submit, your Honor, that it is subject to every objection humanly possible. Could you expect any answer out of the mouth of this witness that now, after the person is dead and after they have had in their possession for several months the application stating that this man did take occasional drinks, he was a social drinker, that he didn't use to excess—they had every opportunity to find out how much drinking he did take, they knew they were not issuing it to the president of the W.C.T.U., and they do nothing but they wait until the man dies and became liable on their policy and they ask

(Testimony of James H. Wainwright.)

a witness on the witness stand: If you had known the man had taken these few drinks that he took over all these years, would you have issued the policy? Answer: No. What answer could you have—what answer could you expect? I submit that the question is wholly objectionable.

The Court: Matter submitted?

Mr. Clausen: Submit the question.

The Court: The objection will be sustained.

Mr. Clausen: Q. What is the company practice—what was the company practice at the time this policy was issued, Mr. Wainwright, with regard to an unfavorable personal history [272] of drinking habits?

Mr. Angell: That is objected to on the grounds it calls for the conclusion of the witness.

The Court: Objection sustained.

Mr. Clausen: All right. You may step down.

We rest, your Honor, except in respect of the matters that I have observed.

(Witness excused.)

Mr. Angell: May we have a recess at this time?

(Short recess taken.)

Mr. Angell: At this time I wish to put into evidence as Plaintiff's exhibit next in order, as 5, first, proof of claim, dated the 16th day of April, 1954, on the form, Claimant's Statement form of Canada Life Assurance Company, and showing apparently receipt in the Canada Life Assurance Company on May 4, 1954, and signed by Charlotte S. Houston.

There is no question made, is there, that that was filed with the Canada Life Assurance Company?

Mr. Clausen: No. I pointed out before—I thought I made it clear, your Honor, there is no necessity for any of these papers going in, because we don't raise any question about proof of loss from a technical standpoint. We urge our two defenses that I have named. The reason also why, your Honor, these should not go in, in my opinion, is because with these papers that evidently were sent in—prepared and sent [273] in to the Company, there were several—or were at least one document here that is improper—I mean so far as this case is concerned—it would be the Coroner's verdict. We are not raising any question about proof of loss, and for that reason, your Honor, in view of the pleadings here, why—

Mr. Angell: We will take the stipulation that the proof of loss was duly filed and no objection was made to that proof of loss, other than those stated in the two separate defenses in the answer, namely, suicide and—

Mr. Clausen: That's right.

Mr. Angell: I want to refer—for the record—and misrepresentation in the application.

All right. Then let the record show that I have returned to you your Proof of Loss form.

(Discussion between counsel.)

Mr. Angell: I would like to offer this in evidence, if I may, and that the Certificate of Death, your Honor—certified—and the reason I am offering this in here—it is the Certificate of Death—I

imagine the Coroner filed this—and it is dated the 22nd day of—the date of death shown, February 22, 1954, and the physician's or the Coroner's certification, it was certified by Bernard D. Bungarz, the Coroner, and it was certified on March 29, 1954.

Mr. Clausen: You are offering that document?

Mr. Angell: I want to give the date of the Inquest [274] here because I believe——

Mr. Clausen: Let's stay with one document. If you are offering the Certificate of Death, we object to that, your Honor, on the ground that it would not be proper evidence, no point in having it in the case. We concede in the answer the man died on February 22, 1954. Now, this apparently would be an attempt, your Honor, indirectly to get before the Court or put in evidence matter which might appear on here. I don't know—I haven't read it through, so——

Mr. Angell: May I finish my offer now?

The Court: Finish your offer. Let him finish his offer so he can get a record.

Mr. Angell: As I say, the date of this Certificate of Death is March 29, 1954; and the next document I will offer——

Mr. Clausen: Well, he is——

Mr. Angell: ——will be the Verdict of the Coroner's Jury, which is dated on the same day, March 29, 1954.

Mr. Clausen: Same objection, your Honor. He only offers that for evidence, which would not be proper and certainly is irrelevant, wholly irrelevant,

as far as this court is concerned. In other words, a recorded verdict of a jury who may for various reasons have found various things at a different time than your Honor may hear this evidence and with different evidence before the jury.

Mr. Angell: May I answer that? [275]

Mr. Clausen: He is encompassing two things there, your Honor. He has got in his hand one paper and he says he is offering another two.

Mr. Angell: I am going to offer one. I will first offer, your Honor, as Plaintiff's exhibit next in order, No. 5, this Certificate of Death, the certified copy of it, showing death due to "external violence, undetermined," and ask that it be accepted into evidence.

Mr. Clausen: May I ask, through the Court, his purpose of offering that?

Mr. Angell: The purpose is to show what the Certificate of Death shows, and it is my opinion that it is admissible in evidence.

Mr. Clausen: Your Honor, what he is trying to do, obviously, from what he just now answered, is to try to put in evidence something that is on a piece of paper that I can't cross examine. There is no point in having it. The man died. The certificate merely certifies to that, which is clear and which is not in dispute in this case.

The Court: Well, then, how——

Mr. Clausen: So I object.

The Court: ——how are you prejudiced by it, if that be true?

Mr. Clausen: Well, for the reason, your Honor,

that some inference might unfavorably be drawn of some language [276] here. For example, he has made reference himself to a word "undetermined."

The Court: The objection will be overruled; let it go into evidence.

(Thereupon Certificate of Death received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Angell: I will offer in evidence the verdict of Coroner's Jury, dated the same day as Plaintiff's Exhibit No. 5, namely, the death certificate—that was March 29, 1954,—showing the result of the Coroner's Jury determination: "This jury is unable to decide from the evidence whether this is suicidal or accidental." And ask that it be marked in evidence next in order.

Mr. Clausen: Would you pause just a moment so that I may—. In the first place, I move to strike what counsel has stated and I object certainly to the offer, your Honor, on the grounds that this Court is not bound by what any coroner's jury may have found. We don't know what went into it. I have no basis of cross examining the piece of paper. It would be very, in my opinion, erroneous. Counsel would be leading the Court, in my opinion, your Honor, into serious error to ask your Honor to receive in evidence, for any reason whatsoever, what a coroner's jury may have found. It can't be offered fairly or sincerely to state that the coroner held an inquest; it can't be offered for any other reason, your Honor, than an [277] attempt to try to have this court led into agreeing with some coroner's jury. In other words, what he is doing is to try to

offer that paper to prove what the paper says. He is not offering it——

The Court: What does the paper say?

Mr. Clausen: Just what he stated.

The Court: What?

Mr. Clausen: “Undetermined death.” Undetermined death.

The Court: Well, what do you spell out of that? Are you prejudiced by that?

Mr. Clausen: Yes, we are, your Honor.

The Court: In what respect?

Mr. Clausen: Because in the verdict here—I want to use the exact words—it doesn’t say “undetermined death” on there. The words “undetermined death” were on the other document to which I objected, but it relates the inability of this particular jury, for reasons which we don’t know anything about, being unable to decide from the evidence.

The Court: Well, if that be true, how are you prejudiced legally in any fashion?

Mr. Clausen: Well, I wouldn’t be prejudiced——

The Court: Let it be admitted and marked.

Mr. Clausen: Your Honor intercepted my statement. I was about to say, and I was never so serious as in what I am talking about, I would not be prejudiced in the eyes and the [278] minds of a court that itself would not pay any attention to this. Then if that is true—in other words, if, as I can assume, that the Court would not pay any attention to it, then I ask the Court why then admit it in evidence?

Mr. Angell: Maybe I can give some light on this.

I would like to. Fortunately, your Honor, I am not treading on new ground, and when those illustrious forebears of ours who appeared before this court and the other courts of California had this question up before them long years ago the same arguments were made and the thing came to final rest in the adjudicated cases. I will say that the cases hold that the testimony of the coroner's jury is not admissible before the court in a case of this kind to determine death but that the coroner's verdict is, and the case—I will cite you two—this is the oldest—and there's any number of them—*Walther vs. Mutual Life Insurance Company*, 65 California 417—they even refused to pay in those days—and there is a series of cases from that which flow——

Mr. Clausen: What is the citation?

Mr. Angell: *Walther vs. Mutual Life Insurance Company*, 65 California 417. But there's plenty of them later. That just takes you back how long it is and shows the basis for the rule, and obviously the reason for it is that it is not to bind this court—this court is going to make its own determination and not the jury over there. The evidence [279] produced before that jury may not have been the evidence produced in this court, and by either side——

The Court: I am going to allow the testimony in subject to motion to strike, and over your objection.

(Verdict of Coroner's Jury received in evidence and marked Plaintiff's Exhibit No. 6.)

The Court: Give counsel an opportunity to examine those authorities that you have.

Mr. Clausen: May I say——

The Court: He may be able to persuade me on my ruling.

Mr. Clausen: May I say, your Honor, of course, that my objection included the objection of hearsay. Your Honor says over my motion to strike. May I make the motion to strike at any time, your Honor? May I make the motion in the briefs that may be submitted following the trial?

The Court: You better get a record on it, whatever it may be, whatever you have in mind. I have made a ruling. This is subject to your motion to strike.

Mr. Clausen: Yes, your Honor.

The Court: Now, you can examine the authorities that he has cited.

Mr. Clausen: All right. I see.

The Court: I will give you an opportunity to change my view on this matter.

Mr. Clausen: Yes. [280]

The Court: More than that I cannot do, that I am able to say to you at this time.

Mr. Clausen: All right, your Honor.

(Witness excused.)

Mr. Angell: Mrs. Houston, will you take the witness stand?

CHARLOTTE H. CLAYTON

the plaintiff, called as a witness in her own behalf; sworn.

The Court: Your name, please?

A. Charlotte H. Clayton.

(Testimony of Charlotte H. Clayton.)

The Court: Where do you reside?

A. 1082 Miller Avenue.

The Court: Berkeley?

A. Berkeley.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Now, Mrs. Clayton, these gentlemen back here want to hear, I want to hear, and I am not so easy in hearing as I used to be; if you will just direct your voice all the way out here and then the Court will be able to hear you, and just think all the time you are either talking to me or someone beyond me, and then the reporter will be able to get you, and hold your voice up, if you can.

A. All right.

Q. And it will be very helpful if we just step along here. [281] Your name is Mrs. Clayton, Charlotte Clayton, at the present time, is it not?

A. That is true.

Q. And when were you married to Mr. Clayton?

A. July 9, 1955.

Q. And prior to that you were the widow of——

Mr. Clausen: What was that date?

A. July 9, 1955.

Mr. Angell: Q. And prior to that date you were the widow of William Houston, the deceased, that is the subject of the litigation here, the insurance policy on his life, is that correct? A. I was.

Q. How long were you married to Mr. Houston?

A. Twenty-five and a half years.

(Testimony of Charlotte H. Clayton.)

Q. Where did you reside at the time of the occurrence here, the death of Mr. Houston?

A. 1082 Miller Avenue, Berkeley.

Q. Had you any children?

A. I have two daughters.

Q. Would you state their names and ages, for the record?

A. Charlotte Houston Gustafson, 26, and Ann Houston Hanscom, 22.

Q. Both children are married?

A. They are both married, yes. [282]

Q. Where does Charlotte live?

A. Charlotte lives in Berkeley.

Q. Where does Ann live?

A. Ann is going the end of the week to San Diego. Her husband is in the Navy.

Q. He is a commissioned officer in the Navy?

A. Yes, an ensign in the Navy.

Q. Now, directing your attention to your life with Mr. Houston, your domestic life and social, Mrs. Houston. Will you briefly state whether it was a happy or unhappy marriage for you?

A. It was a very happy marriage.

Q. Was it a discordant or a very, very close-knitted, happy family?

A. It was a close-knitted, happy family.

Q. Was Mr. Houston fond of you?

A. Very.

Q. And did you or Mr. Houston ever have any marital trouble of any serious kind or nature?

A. We did not.

(Testimony of Charlotte H. Clayton.)

Q. Prior to Mr. Houston's death or immediately prior thereto, was there any act or circumstance in your social or marriage life, your domestic life, which you could state would have caused Mr. Houston to take his own life?

Mr. Clausen: I object to that, your Honor, as calling [283] for the conclusion of the witness. Certainly any act at all, at any time in their life, could cause that to happen, your Honor, would be too all-embracing, remote, speculative, and then calling for the conclusion.

Mr. Angell: I will withdraw that to save argument on it, your Honor.

The Court: Reframe it.

Mr. Angell: Q. Immediately prior to the death of Mr. Houston, on February 22, 1954, had you or Mr. Houston had any differences or any unpleasant words about anything whatsoever?

A. We had not.

Q. Would you describe to the Court in your own words, so that I won't be said to be leading you, what was Mr. Houston's disposition, appearance, as to whether he was unhappy, depressed, melancholy or whether he was pleasant and happy; will you just tell the Court in your own words—say, cover the week just prior to the date of his death?

Mr. Clausen: Well, your Honor, I object to that as ambiguous. I don't know what the question would mean. The witness to talk about a week before the death?

(Testimony of Charlotte H. Clayton.)

The Court: The objection will be overruled. She may answer.

A. We had a very happy weekend. I am not sure that I can remember what happened early in the week, but we had seen our two daughters; we had seen Charlotte Houston; we had dinner [284] with friends; we had gone to Ann's sorority house to a reception; we had been to lunch; we had a very happy time with our friends and with our children.

Mr. Angell: Q. Now let's go back. When was the date or party at your daughter's sorority?

A. The party at my daughter's sorority house was on Saturday night. That would have been February 20th.

Q. That was at the University of California?

A. At the University of California.

Q. What sorority does she belong to?

A. My daughter Ann, Alpha Chi Omega. And my daughter Charlotte and her husband, Roger, picked Mr. Houston and me up, and we went first to the Kappa Kappa Gamma house where Roger's sister had just been pledged. Then we went to the Alpha Chi house where my daughter was, of which my daughter was a member.

Q. That is, now — let's get these daughters straightened out.

A. I should say Ann and Charlotte.

Q. Which daughter was Alpha Chi Omega?

A. They both were, but Ann at that time was in the university and was a member. It was to Ann's reception that we went.

(Testimony of Charlotte H. Clayton.)

Q. It was Ann's reception that you were going to?
A. That's right. [285]

Q. What was that reception, what was the purpose of it, Mrs. Houston?

A. At the end of rush week the sororities have a reception to introduce their new pledges to their families and to their friends and to the boys on the campus, and families are invited, and we went to see what they did by way of rushing that year.

Q. You and Mr. Houston went?

A. We went with Charlotte and Roger.

Q. Did he seem to enjoy it?

A. Very much.

Q. Did he mingle among the folks there?

A. Yes.

Q. Did he meet the young ladies and their parents?
A. He did.

Q. And was pleasant?
A. Very pleasant.

Q. Did he seem downcast at any time then or moody?
A. Not at all.

Q. Or depressed?
A. Not at all.

Q. Melancholy?
A. Not at all.

Q. Did he act as he had usually, always acted on that occasion? [286]
A. The same.

Q. You saw no difference?

A. No difference.

Q. Then you went to an evening at some friends; was that the evening or the night before?

A. That was Sunday night.

Q. Sunday night. Where did you go that night?

(Testimony of Charlotte H. Clayton.)

A. That was the night we went to dinner with the Hanscoms.

Q. And the Hanscoms—will you just state for the record who the Hanscoms are.

A. The Hanscoms are friends of long standing. I think we had probably known them at that time about eight years. And at that time my daughter Ann was engaged to their son Ronald. She has since been married to him.

Q. What is Mr. Hanscom's occupation or profession?

A. Mr. Hanscom is a patent lawyer.

Q. He is a patent—

A. Attorney, I should say.

Q. Is Mr. Hanscom in the court room?

A. Mr. Hanscom is in the court.

Q. It is his son who is married to your daughter, Ann?

A. That is right.

Q. How long have they been married?

A. They were married June 25, 1955.

Q. At the time of Mr. Houston's death had the date for the [287] marriage been set?

A. Yes, it had been set.

Q. Did Mr. Houston seem pleased with his new son-in-law?

A. He was very pleased. He was very fond of Ronald, admired him.

Q. Was he happy at the thought of his daughter getting married?

A. I am sure he was.

Q. Did he ever express any feelings that he was regretful or was going to feel melancholy, or de-

(Testimony of Charlotte H. Clayton.)

pressed because she left.

A. He felt as I did, that——

Mr. Clausen: Object to that, your Honor, the voluntary statement.

A. Pardon me.

Mr. Clausen: And expressing the opinion of the witness.

The Court: It may go out.

A. We both felt——

Mr. Clausen: Same objection.

The Court: The objection is sustained, it is a voluntary statement.

Mr. Angell: Q. Did Mr. Houston state his feelings toward Ann getting married to Mr. Hanscom—or to Mr. Hanscom? A. Oh, yes.

Q. What did he say?

A. They were both very happy. [288]

Q. And Mr. Houston was happy about it?

A. They were both very happy.

Q. Did he go out with this young man who was about to marry Ann—in other words, did he go to social events with him? A. Oh, yes.

Q. They went hunting?

A. They went hunting, had gone fishing.

Q. Up to Southern Oregon?

A. He had been to our camp in Oregon the summer before.

Q. Let's take Charlotte, who is Charlotte's husband? A. Roger Gustafson.

Q. Roger Gustafson. They live in Berkeley, do they not? A. They do.

(Testimony of Charlotte H. Clayton.)

Q. Incidentally, the Hanscoms live in Berkeley, do they not? A. They do.

Q. They live near you?

A. They live the other side of the campus from me.

Q. You live at what address—lived at what address at the time of Mr. Houston's death?

A. 1082 Miller Avenue.

Q. And that is just above Clyde, is it not, in Northern Berkeley—North Berkeley Hills?

A. It is.

Q. Then Mr. Hanscom lives over on Domingo Avenue? [289] A. Domingo Avenue.

Q. Near the Berkeley Tennis Club, is it not?

A. Within two blocks.

Q. Within two blocks of the Claremont Hotel. Did Mr. Houston take trips with Roger Gustafson, Charlotte's husband?

A. Yes, they—Roger came to our camp two summers for his vacation, and he and Mr. Houston rode horseback almost every weekend. Mr. Houston had horses near Martinez.

Q. Had they been ridden—had they been riding the day before Mr. Houston's death?

A. No, they didn't ride that weekend.

Q. Do you know why?

A. No, I do not know why.

Q. Isn't it true that that day before Mr. Houston spent— A. That was Sunday, yes. [290]

Q. Sunday? A. Yes.

Q. —that he spent—. Well, what did he do the day before? You tell me.

(Testimony of Charlotte H. Clayton.)

A. My mother was visiting us, and my mother, my husband and I went to church in the morning. And after church Mr. Houston went out to Lafayette to make plans for his ranches in Oregon with his two partners, Mr. Wilks and Mr. Taylor.

Q. What is Mr. Taylor's first name?

A. Mr. Houston always called him Ev. I believe his name is Sam.

Q. Do you know his profession or occupation?

A. He is a lawyer.

Q. And with offices here in San Francisco?

A. Yes. He was attorney, I think, for New Zealand.

Q. He was the attorney for New Zealand?

A. I think.

Q. Life Insurance Company. And Mr. Taylor was the Taylor of the firm of Thornton and Taylor, isn't that right?

A. That's right.

Q. With offices on California Street in San Francisco?

A. That's right.

Q. And who is Mr. Wilks, what is his first name?

A. Gilbert Wilks.

Q. What is his business or profession? [291]

A. He is head of a stevedoring company in San Francisco.

Q. And, as I understand it now, on the Sunday before—that would be February 21—Mr. Houston went out there and spent part or a good deal of that day with Mr. Taylor and Mr. Wilks, is that right?

A. He had lunch there. He brought us home after church and went on to Lafayette and had lunch with

(Testimony of Charlotte H. Clayton.)

Mr. Wilks, and he and Mr. Wilks and Mr. Taylor had this meeting during the afternoon to plan what they were going to do with the spring crops.

Q. And now you refer to the spring crops. It is true, is it not——

I am going to lead, counsel, where there can be no question about it——

Mr. Houston had an interest in farming properties in Southern Oregon, is that right?

A. That's right.

Q. Where were these properties?

A. They were near Lakeview.

Q. Both of them? A. Yes.

Q. There were two different properties, were there not? A. There were.

Q. One of them was known as the T-Bone Ranch? A. That's right. [292]

Q. That was a corporation, was it not?

A. Yes.

Q. And Mr. Wilks and Mr. Houston and Mr. Houston and Mr. Taylor owned all the stock of that corporation, is that right?

A. In T-Bone, yes.

Q. Yes. Now, then, was Mr. Utley a stockholder in T-Bone?

A. He was a stockholder in Southern Oregon, he and the other three men.

Q. Now then, they had a corporation also that operated the other piece of property and that was known as the Southern Oregon?

A. Southern Oregon Ranches.

(Testimony of Charlotte H. Clayton.)

Q. And the stockholders in that were Mr. Houston, Mr. Harry Utley, Mr. Wilks and Mr. Sam Taylor, is that right? A. That's right.

Q. What did the T-Bone Ranch grow, if anything?

A. I think they used it mostly for pasturage.

Q. That was a pasturage ranch?

A. I think so.

Q. What did the Southern Oregon Ranch produce? A. Wheat.

Q. Do you know whether Mr. Houston was planning, prior to his death and immediately prior to his death, to changing the method of farming up there or going into the cattle [293] business?

A. Yes, he was, and on Wednesday, I think, of that next week, the man who ran the ranches for them was coming to confer to make final arrangements.

Q. In other words, they had a superintendent in Southern Oregon, Lakeview, who ran these ranches, is that right? A. That's right.

Q. Do you know that gentleman's name?

A. I am afraid I can't recall it.

Q. And that gentleman was coming down here that week, is that correct? A. That is true.

Q. And the purpose of coming down was to determine whether they should purchase cattle or not to go on that ranch? A. Yes.

Q. What time did Mr. Houston return from Mr. Wilks' house out there at Orinda on that Sunday?

(Testimony of Charlotte H. Clayton.)

A. Just in time to get ready to go to the Hanscoms.

Q. When Mr. Wilks returned from there did you notice any change in Mr. Houston's attitude or disposition or did he indicate in any way that anything had happened out at that meeting?

A. No. I think it had been a successful meeting. There was no difficulty.

Q. Did he appear melancholy, depressed? [294]

A. Not at all.

Q. In any way? A. Not at all.

Q. Before I forget it, did Mr. Houston ever at any time in any way express to you the thought of self-destruction or whether he would——

A. Absolutely not.

Q. Now, on that night, Sunday, you say he had come back just in time to go to the social occasion and that, I think you testified, was at the home of Mr. and Mrs. LeRoy Hanscom, is that true?

A. That's right.

Q. At 66 Domingo Road in Berkeley. You went on to that dinner, did you?

A. We went on to that dinner.

Q. Who was present at that dinner?

A. My daughter and her fiancée, Ronald, Mr. and Mrs. Hanscom, my mother, Mrs. Spaulding, Mr. Houston and I.

Q. And what time did you say you arrived there?

A. 6:30, I think.

Q. And would you state, as near as you can recall, when you left there?

(Testimony of Charlotte H. Clayton.)

A. After the dinner party?

Q. Yes.

A. I imagine between 11:00 and 11:30. I'm not positive. [295]

Q. Between 11:00 and 11:30? A. Yes.

Q. It might be a little earlier?

A. Well, it might have been. I'm not sure.

Q. Would you describe to the Court, just quickly in general terms, the nature of that party, whether drinks were served there?

A. Yes, we had drinks before dinner.

Q. And can you recall how many Mr. Houston had?

A. I don't think that any of us had more than two.

Q. And were those served——

A. That is what we usually have at the Hans-coms.

Q. And those were before dinner or after dinner? A. Before dinner.

Q. Were there any drinks served after dinner at all? A. No.

Q. What happened at that party, was there anything there that did upset—anything that occurred that upset Mr. Houston or in any way disturbed him?

A. Not at all. It was a very happy, congenial family type group. We didn't play bridge, we just sat and talked after dinner.

Q. It was just a family evening, gathered around

(Testimony of Charlotte H. Clayton.)

a dinner table, and then in the living room after the dinner?

A. That is true. [296]

Q. At which you just talked about things in general, is that right? A. That is all.

Q. Now, when you went home after that dinner, did you go directly home? A. We did.

Q. And did you then retire? A. We did.

Q. Did you and Mr. Houston sleep in the same room? A. We did.

Q. Did Mr. Houston in any way that evening, after you went home, did he make any statement about feeling ill, depressed or melancholy at all?

A. Not at all.

Q. Was he congenial, in a congenial, jovial mood? A. Very.

Q. And seemed perfectly happy? A. Yes.

Q. Did Mr. Houston indicate any thought of suicide? A. Absolutely not.

Q. What time did you arise, you personally, get up on the morning of February 22, 1955?

A. I think Ann and I got up about 9:30.

Q. About 9:30? A. Yes. [297]

Q. Did you have your breakfast when you got up? A. Yes.

Q. Did you go about your household duties?

A. Yes.

Q. Did Mr. Houston get up then?

A. No, he didn't.

Q. When did Mr. Houston get up?

A. He got up after I went upstairs and woke

(Testimony of Charlotte H. Clayton.)

him and asked him if he would like to come downstairs and have lunch with us.

Q. In other words, Mr. Houston slept right straight through until you awakened him, is that correct? A. That is true.

Q. And what time was that, that you awakened him, Mr. Houston?

A. It must have been between 1:00 and 1:30.

Q. When Mr. Houston woke up, did he appear to be gloomy or melancholic at all? A. Not at all.

Q. Did he seem to be congenial and happy?

A. He did.

Q. What did you say to Mr. Houston when you went up there and woke him up, and what did he say to you, as near as you can recall?

A. I asked him if he would like to get up and eat with us. [298] And he said yes, he would. And I said, "Would you like to have me bring you a glass of tomato juice?" And he said yes, he would.

And I went downstairs to get the tomato juice.

Q. And did you bring it back up to him?

A. I brought it back and put it on the top of the stairway, the floor of the upstairs hall—you can reach through the bannister—and I put it up there.

Q. Did Mr. Houston take that glass of orange juice—well, tomato juice—and drink it?

A. He did.

Q. And then you went back in the kitchen, as I understand it, did you? After you put that there, you went back in the kitchen? A. Yes.

Q. What were you doing in the kitchen?

(Testimony of Charlotte H. Clayton.)

A. I was cooking.

Q. You were cooking? A. Cooking.

Q. You were cooking breakfast?

A. No, it was breakfast for Mr. Houston, it was lunch for Ann and me.

Q. Brunch?

A. Brunch. I think my mother hadn't had breakfast either.

Q. You have a patio, have you not, right off your kitchen? [299]

A. I have a patio off the kitchen.

Q. Did you eat in that patio—were you eating in that patio that morning?

A. We had planned to and Ann and I had been out there that morning and planned to, and decided it was too cold.

Q. How does it come you rose or Mr. Houston slept so late on Sunday? Is there any reason for that at all? A. This was Monday.

Q. I mean, on that Monday.

A. On Monday. He always slept late unless we went to church early; he slept late on Saturdays—so did I.

Q. Was there anything unusual about Mr. Houston sleeping until 1:00 or 1:30? A. Nothing.

Q. Now, that is the last time you saw Mr. Houston, when you took the tomato juice up, put it on the stairs, is that correct?

A. No. I saw him in the kitchen later when he came downstairs.

Q. Oh, that's right. Then will you tell us what

(Testimony of Charlotte H. Clayton.)

happened immediately after that; did Mr. Houston come downstairs?

A. He came downstairs.

Q. Will you just indicate here on this exhibit, if you will, Mrs. Houston—referring to Plaintiff's Exhibit 1—which, by the way, for the record, your Honor, I would like [300] to now offer in evidence. It is only in for identification.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Thereupon chart, previously marked for identification, was received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Angell: Q. Call your attention to Plaintiff's Exhibit 1. Would you indicate with the pointer where the breakfast room is? It will not show on that diagram. That—it will be above something on that diagram.

A. The breakfast room? We don't have a breakfast room. The kitchen is above this room (indicating).

Q. The kitchen is above what is called on that diagram, Plaintiff's 1, "Servants' Quarters", is that correct? A. Servants' room.

Q. Now then, can you indicate on that diagram where the stairs that Mr. Houston came down from upstairs, the bedroom——

A. Oh, that's a little difficult. It must be over these steps (indicating).

Q. Mr. Houston came down the stairs, and in

(Testimony of Charlotte H. Clayton.)

Q. Then Mr. Houston, as I recall it, passed right through the kitchen where you were and down the stairway, is that correct?

A. I didn't see him go down the stairs, no. I went into the dining room.

Q. You went out in the dining room?

A. The dining door is here (indicating).

Q. Did you notice how Mr. Houston was dressed when he went through the kitchen?

A. He was wearing pajamas and a robe and slippers.

Q. Pajamas, robe and slippers? A. Yes.

Q. What kind of slippers were they, were they mules or were they——

A. They were leather slippers.

Q. They were leather slippers? [304]

A. Leather slippers.

Q. Did the bathrobe have a belt on it?

A. It did have.

Q. And did you observe how that belt was tied that particular morning?

A. Well, I don't know that I observed it that particular morning. He always tied it very loosely.

Mr. Clausen: Object to what it might have been on other mornings, Your Honor. Suggest that go out as nonresponsive to the question.

The Court: Objection is overruled. Let it stand.

Mr. Angell: Q. Did you notice whether Mr. Houston had any gun in his hand or anything in his hands at all?

A. No. I know he didn't have.

(Testimony of Charlotte H. Clayton.)

Q. He did not have? A. He did not have.

Q. Now, you said you then went into the dining room and came—.Did you return into the kitchen? A. Yes. And—may I explain?

Q. Yes.

A. We had planned eating in the patio, which is here (indicating)—there is a door coming out of the front hallway, and I decided it was a little too cool. My mother was there—

Mr. Clausen: Your Honor, object to the [305] volunteer statement of the witness.

The Witness: I'm sorry.

Mr. Clausen: I would suggest that counsel proceed by question and answer.

The Court: It may go out.

Mr. Angell: Q. You then went into the kitchen, is that correct? A. That's correct.

Q. Now—by the way, I want to ask you, was Mr. Houston wearing any glasses that morning?

A. No, he was not.

Q. Was it Mr. Houston's custom to wear glasses? A. Yes.

Q. At all times? A. Yes.

Q. Both in the office working, reading, and also when he was just on the street, is that correct?

A. He wore tri-focals.

Q. He wore tri-focals and wore them all the time? Is that right? A. Right.

Q. But he had no glasses on this morning when he went down into the basement or when you saw him going through the kitchen, is that right?

(Testimony of Charlotte H. Clayton.)

A. Yes. [306]

Q. When is the next time you saw Mr. Houston?
A. I didn't see him again alive.

Q. The next time you saw him, Mr. Houston was dead, is that correct?

A. (Witness nods head.)

Q. What occurred there that led you to go into the basement? You were the one that went down and found Mr. Houston, were you not?

A. I was.

Q. How did you come to go down there into the basement at that time? What caused you to go down?
A. I heard a heavy thud.

Q. You heard a thud? A. Very heavy thud.

Q. And then did you go down alone or did Ann go with you? A. I went down alone.

Q. And when you went down was the door going into the basement, the part of the basement where Mr. Houston's body was found, was that door open or closed? A. It was open.

Q. It was open. And you saw Mr. Houston lying there on the floor, is that correct?

A. I couldn't see him until I got down the steps.

Q. You got down the steps, you went into the room then, did you? [307] A. Yes.

Q. Then you saw Mr. Houston lying there, did you not? A. Yes.

Q. Officer Pine has placed on Plaintiff's Exhibit 1 a P-1 indicating the position of Mr. Houston's body when he first saw it. I will ask you if you

(Testimony of Charlotte H. Clayton.)

recollect if that is where Mr. Houston was lying when you saw it?

A. I think he was lying here (indicating). His head was almost up to the washing machine.

Q. Will you take that green chalk and will you just place an X in there where you think Mr. Houston's body was lying, and will you mark that with you initials, C. C., and 1.

(Witness indicating CC-1.)

The Court: We will take the adjournment, if it is agreeable to both sides. 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. November 9, 1955.) [308]

The Clerk: Houston vs. The Canada Life Assurance Company, further trial.

Mr. Angell: Ready, your Honor.

Mr. Clausen: Ready.

CHARLOTTE H. CLAYTON

the plaintiff, recalled as a witness in her own behalf; previously sworn.

Direct Examination—(Resumed)

Mr. Angell: Q. Mrs. Clayton, you were at the board showing the physical features of the basement last night when we closed and I believe that you had just put a green circle on a mark that you had made on Plaintiff's Exhibit 1 showing what you believe to be was the location of Mr. Houston's

(Testimony of Charlotte H. Clayton.)

body when you found it on the afternoon of February 22nd. Is that correct?

A. That's correct.

Q. Will you step back here to the board with the pointer. Now, this map is drawn to scale, your Honor, and for the purpose of the record, it shows that the scale is three-quarters of an inch to one foot, and attached to Plaintiff's Exhibit 1 is a scale ruler of Acme Legal Service, which is the same ruler for this particular map of three-quarters of an inch to one foot, and I will ask that [311] this same ruler be marked part of this Plaintiff's Exhibit 1.

And, for the record, I want the record to show that the hole cut in the floor shown in Plaintiff's Exhibit 1, and, from this scale ruler, to the point where Mrs. Clayton says she first saw Mr. Houston's body, is 22 feet.

Now, Mrs. Clayton, what was this basement used for?

A. This end, the basement was used for storing, for laundry purposes.

Q. When you say "this end" you are pointing to the south end as shown by Plaintiff's Exhibit 1, is that correct?

A. That's correct.

Q. This?

A. This end, for storage.

Q. The storage, was that the north end of the basement? Is that right?

A. That's correct.

Q. Was that basement divided up into different levels?

A. Yes, it was.